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In the Supreme Court of the United States

OCTOBER TERM 1968

No. 1327

SOUTHERN PACIFIC COMPANY,
a Corporation,
Petitioner,

vs.

MIKE SABELLA.

Petition for a Writ of Certiorari to the Supreme Court of California

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In the Supreme Court of the United States

OCTOBER TERM 1968

No. ——

SOUTHERN PACIFIC COMPANY,
a Corporation,

Petitioner,

vs.

MIKE SABELLA.

Petition for a Writ of Certiorari to the Supreme Court of California

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To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

This action was by a railroad worker against his employer for damages for personal injuries suffered in the course of his employment. The action was under the Federal Employers' Liability Act. (Pleadings, R 4-8) Agreeably to that Act it was tried by jury in the Superior Court of California. Plaintiff had a verdict of $115,500.00. Defendant's motion for a new trial was denied on condition that plaintiff consent

to reduction of the judgment to $80,000.00. In proper time plaintiff filed that consent. (R 88-90, 83, 84, 177, 178, 161) Defendant appealed. (R 162)

On motion for new trial and on appeal defendant urged that it had been denied a fair trial by misconduct of plaintiff's counsel in his arguments to the jury—including, but not limited to, improper appeals to passion and prejudice—objected to and assigned "as misconduct" by defendant at the time.[1] The Court of Appeal of California sustained defendant's position and reversed. The Supreme Court of California then took the case over and affirmed, the Chief Justice dissenting.

The matter at stake is the integrity of the jury process,[2]—whether gross, wilful and persistent misconduct in argument to the jury, much of it assigned as misconduct, which was prejudicial and deprived defendant of a fair trial, can be brushed aside because, it is said, the party prejudiced did not object enough and when it did object, although its point was clearly conveyed to the trial judge, it did not use a ritual form and speak just the right words.[3]

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1. Chief Justice Traynor, in his dissent from the decision of the Supreme Court of California, footnote no. 1, App. C hereto, p. 32, sests out 10 such objections and assignments, And see p. 15ff, below.)

2. *New York Central R. Co. v. Johnson,* 279 U.S. 310, 318, quoted in footnote 6, below. Compare *Berger v. California,* U.S. , 21 Led 2d 508, 510 (Oct. Term 1968, No. 221, Misc., Jan. 13, 1969) reversing for the admission of earlier testimony of an absent witness because inability to cross-examine "may have had a significant effect of the 'integrity of the fact-finding process.' *Linkletter v. Walker,* 381 U.S. 618, 639." *Linkletter* said that the principal it applied "went to the fairness of the trial,—the very integrity of the fact-finding process." Cf. *Roberts v. Russel,* 392 U.S. 293.

3. The form of "assignment of misconduct" had been sufficient in earlier decisions of the California Supreme Court. See footnote 4, below. The Court of Appeal in this case said that "there were three motions for mistrial and nine citations of misconduct. We are not disposed to say that conforming with a precise ritual is always necessary in protesting a series of offenses."

The Supreme Court of California assumed that statements in the argument of plaintiff's counsel "were both improper and prejudicial"; said that they were "not part of the repertoire of the ethical professional man"; that "we conclude that plaintiff's counsel was guilty of deplorable misconduct which might well have been prejudicial"; assumed that the "misconduct went to the issue of liability"; gave examples of statements made and said "all of which tactics are improper and to be condemned"; assumed that "the entire line of argument was misconduct" and again spoke of the "deplorable conduct of plaintiff's counsel" and the "intemperate and unprofessional conduct by counsel as is here involved"; said that "these same tactics, in another context, would likely result in a reversal." (See App. C hereto, pp. 25 ff.)

But the Supreme Court of California held that "the award to plaintiff, as modified by the remittitur, is justified" and affirmed the judgment because, so it said, though the defendant objected, as the Court conceded, this was at a "tardy point" (with deference, the first assignment of misconduct was at the start of plaintiff's opening argument to the jury and immediately upon the making of the first improper statement (R. 587, App. D hereto, p. 40)), defendant "remained silent as to all but one line of agrument" (again, with deference, footnote no. 1 to the dissenting opinion of the Chief Justice exposes the error of this statement, App. C hereto, pp. 32 ff, and see this matter at p 15 ff, below) and in objecting failed to use the proper formula—for though there was *objection and assignment of misconduct* the de-

fendant failed to ask that the jury be admonished—it only assigned and asked for a mistrial![4]

So holding the California Supreme Court not only ignored earlier California decisions[5] but ignored the contrary decisions of this Court in *New York Central R. Co. v. Johnson,* 279 U.S. 310, 318[6] which settled the rule and particularly

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4. See footnote no. 1 to the dissent of the Chief Justice and p. 15 ff. below.

The Chief Justice, in footnote 2 to his dissent, said that "It is at least debatable that *implicit in an objection to misconduct* is a request that the jury be admonished to disregard it."

In *Hoffman v. Brandt,* 65 C2d 549, 551, which reversed for misconduct in argument, all that objecting counsel said was that a "suggestion that counsel makes (specifying it) is totally unwarranted. For counsel and I both know that that is an incorrect statement." Compare the Court of Appeal quoted in footnote no. 3 above.

In *Squires v. Riffe,* 211 Cal. 370, 373, an assignment of a question "as misconduct" and a motion for mistrial was enough.

People v. Kirkes, 39 C2d 719, 726, said the rule was that where there was an improper statement counsel should "assign it as misconduct, *or* request the court to instruct the jury to disregard it."

Brown v. Rosenberg, 209 Cal. 4, 6, holding that an admonition did not cure the harm, noticed that "the remark was properly *assigned as misconduct.*"

Cf. *Keena v. United Railroads,* 197 Cal. 148, 156ff.

5. Footnote 4, above, and particularly its recent decision in *Hoffman v. Brandt.*

6. The assignment of error was failure of the trial court to sustain objections or otherwise project against misconduct in argument in "appeal to passion and prejudice." Reversing, this Court said: "Respondents urge that the objections were not sufficiently specific to justify a reversal. But a trial in court is never as respondents in their brief argue this one was, 'purely a private controversy . . . of no importance to the public.' *The state,* whose interest it is the duty of court and counsel alike to uphold, *is concerned that every litigation be fairly and impartially conducted and that the verdicts of juries be rendered only on the issues made by the pleadings and the evidence.* The public interest requires that the court of its own motion, as is its power and duty, protect suitors in their *right to a verdict uninfluenced by the appeals of counsel to passion or prejudice.* (Citations) Where such paramount considerations are involved, the failure of counsel to particularize an exception will not preclude this court from correcting the error. (Citation)."

Minneapolis, St. Paul etc. Ry. Co. v. Moquin, 283 U.S. 520[7] which applied the rule to an F.E.L.A. case tried in a state court.

Deeming itself aggrieved, and petitioning this Court to issue its writ of certiorari to the Supreme Court of California and reverse its judgment, your petitioner, the defendant and appellant Southern Pacific Company, respectfully shows:

I

OPINIONS BELOW

The memorandum order of the Superior Court (trial court) denying defendant's motion for a new trial is not reported. It is reproduced in Appendix A hereto (App. p. 3).

The opinion of the Court of Appeal for the State of California, First Appellate District, Division Four, is reported in 262 ACA 582[8] and 68 Cal Rptr 896. It will not be "officially" reported.[8] It is reproduced in Appendix B hereto (App. p. 5; R. 771 ff).

The opinion of the Supreme Court of California and the dissenting opinion of the Chief Justice are reported in 70 AC[9] 323, 449 P2d 750 and 74 Cal Rptr 534. The opinions are reproduced in Appendix C hereto (App. p. 20ff; R. 791 ff).

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7. In *Moquin* there was no objection at all. See p. 31, below where this case is stated and quoted. The Supreme Court of California, in a footnote, cited this case but to another point.

8. Advance California Appellate Reports, the advance sheets of the opinions of the Courts of Appeal of the State of California. The Supreme Court of California having granted a hearing and transferred this case to the Supreme Court for decision the opinion of the Court of Appeal will not be "officially" reported.

9. Advance California Reports, the advance sheets of the opinions of the Supreme Court of California. The opinion will be officially reported in 70 California Reports, 2d Series.

II

JURISDICTION OF THIS COURT

The judgment of the Supreme Court of California, the judgment sought to be reviewed, was rendered, filed and entered on February 7, 1969 (App. C, hereto, pp. 20-38, R. 791ff).

There was no order respecting a rehearing. The remittitur of the Supreme Court of California issued on March 10, 1969. (Rules on Appeal, Rule 25; App. C hereto, p. 38, R 821.) There was no order granting an extension of time to petition for certiorari.

The jurisdiction of this Court is invoked upon these grounds: The question presented is a substantial Federal question "of importance in the uniform administration of" the Federal Employers' Liability Act.[10] The assertion by defendant of Federal rights under it[11] is not to be defeated under the name of local practice.[12] It is believed that Judicial Code § 1257(3) (28 U.S.C. § 1257(3)) confers upon this Court jurisdiction to review the decision of the Supreme Court of California by writ of certiorari (*Norfolk So. R. Co. v. Ferebee,* 238 U.S. 269; *Minneapolis, St. Paul etc. Ry Co. v. Moquin,* 283 U.S. 520; *Brown v. Western Ry. of Alabama,* 338 U.S. 294; *Arnold v. Panhandle etc. Ry. Co.,* 353 U.S. 360, 361).

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10. *Davis v. Virginian R. Co.,* 361 U.S. 354, 355; *Brown v. Western Ry. of Alabama,* 338 U.S. 294, 295, 399; *Dice v. Akron, C. & Y.R. Co.,* 342 U.S. 359, 361ff. See p. 8ff, below.

11. Wholly aside from due process, trial by jury is a right conferred by the Federal Employers' Liability Act. (*Jacob v. City of New York,* 315 U.S. 752; *Bailey v Central Vermont R. Co.,* 319 U.S. 350; *Blair v. Baltimore & O. R. Co.,* 323 U.S. 600; *Rogers v. Missouri Pac. R. Co.,* 352 U.S. 500.)

12. See p. 31ff, below, Reasons for Allowance of this Writ.

III

THE QUESTION PRESENTED FOR REVIEW

The question presented, in substance, has been stated (p. 2, above). It is this: An action under a Federal statute, the Federal Employer's Liability Act (see p. 1, above, and pp. 9-10, below), was tried in a state court, as contemplated by the statute. The right to trial by jury is "part and parcel of the remedy" under the Act (*Bailey v. Central Vermont R. Co.*, 319 U.S. 350, 353; see footnote 11, above). The case was tried to a jury. In the course of argument to the jury counsel for the plaintiff was guilty of gross and persistent misconduct, "deplorable conduct," including unwarranted vilification of the defendant and personal attacks, misstatements and appeals to passion and prejudice. (See p. 12ff, below.) The state reviewing courts found or were willing to assume that the statements were misconduct and prejudicial. The resulting verdict was grossly excessive (by 44%). In at least 10 instances the statements of plaintiff's counsel were objected to and assigned as misconduct and 3 times a motion for mistrial was made. For practical purposes the trial court gave the defendant no protection or overruled its objections and assignments of misconduct. Is a party, in an action under the Federal Employers' Liability Act, to be thus denied a fair trial by jury because, although the misconduct was promptly, clearly and understandably assigned and counsel made an unmistakable appeal to the court for protection, he did not in so many words articulate a request that the jury be admonished to disregard the improper remarks? Can such a rule be applied where it would be impossible for a jury to "unring the bell"?[13] Is a state court

13. *Love v. Wolf*, 226 CA2d 378, 392 (hr. den.).

free to apply such a rule to a defendant under the Federal Employers' Liability Act when it applied no such rule to a plaintiff suing under state law (cf. *Hoffman v. Brandt,* 65 C2d 549, footnote 4, above)? Is a State Court to be permitted, with all due deference to that Court, to so play fast and loose with the integrity of administration of the jury process when it is employed under a Federal Statute calling for uniform administration and making trial by jury part of the remedy it provides?[14] Is not this case controlled by *Minneapolis, St. Paul etc. Ry. Co. v Moquin,* 283 U.S. 520?

IV

STATUTORY PROVISIONS INVOLVED

The action was under the Federal Employers' Liability Act, Act of April 22, 1908, c. 149, 35 Stat. 63 as amended by Act of August 11, 1939, c. 685, 53 Stat. 1404 (45 U.S.C. § 51ff). Although its terms as such are not drawn into the question presented the following are the provisions which applied to the action, as they appear in the United States Code:

> § 51. Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and child of such employee; and, if none, then of such em-

14. See the last paragraph of the dissenting opinion of Chief Justice Traynor (App. C, p. 37).

ployee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases' (approved April 22, 1908), as the same has been or may hereafter be amended.

* * *

§ 53. In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

§ 54. In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the

death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier: and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

* * *

§ 56. No action shall be maintained under this chapter unless commenced within three years from the day the cause of action accrued.

Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

V

STATEMENT OF THE CASE— RAISING AND DETERMINATION OF THE FEDERAL QUESTION

The general nature of the case appears from the statement of the Supreme Court of California:

"Plaintiff Mike Sabella was injured while working as a 'carman cutter' for defendant railroad. Among other duties, it was his task to cut damaged freight cars into scrap. While doing so, plaintiff fell from the roof of a car he was cutting and sustained severe back injuries. He alleged that his fall was caused by the negligence of defendant's crane operator in moving the roof sec-

tion, which had been attached to the crane preparatory to lifting the section off, while plaintiff was still walking on it; and by failure of defendant to provide a reasonably safe place in which to work. The defense was based on a denial of negligence and an allegation of contributory negligence, which may reduce an F.E.L.A. award." (App. C, p. 20)

A. Proceeding on the Trial

There was never a claim that the evidence was insufficient to sustain a verdict for either the plaintiff or the defendant or was insufficient to sustain a finding of contributary negligence in reduction of damages (F.E.L.A. § 3, 45 U.S.C. § 53). There was no claim of error in instructions. One matter of exclusion of evidence—the first matter dealt with by the Supreme Court of California—must be stated to make understandable some other matters.

The plaintiff introduced documentary evidence of plaintiff's physical condition. On introduction of this evidence the jury was told that it was from "The Southern Pacific Company Hospital records" (for all that appeared, part of the "treatment" record) and was in connection with an "application" (for all that appeared, for a job with defendant which plaintiff claimed, starting with his opening statement, plaintiff had applied for and defendant had refused). (R. 394-397) Defendant then, *by use of the same documents* (Cal. CCP § 1854, now Evi. Code § 356) sought to identify them, to place them in their true setting and to show that the "medical" material, although attached to the hospital record, was no part of the treatment record and that the application was not one addressed to defendant. To this it was objected that this would show that plaintiff was making application for a railroad pension, that the resulting prejudice out-

weighed the benefit of the otherwise proper material and that it should be excluded under *Eichel v. New York C. R. Co.*, 375 U.S. 253. (R. 562-574) The defendant's position was that *Eichel* did not apply because plaintiff had "opened the door," a position since sustained by *Gladden v. P. Henderson & Co.*, 385 F2d 480 (Cir. 3), cert. den. Apr. 8, 1968, U.S. , 20 L ed 2d 162, 88 S. Ct. 1262.

B. Plaintiff's Argument to the Jury

In argument to the jury the plaintiff's attorney indulged in statements which the Supreme Court of California has characterized as improper, deplorable misconduct, intemperate and to be condemned (see p. 3, above). The entire opening and closing arguments are set out in Appendix D hereto. The deplorable misconduct has been summarized in part in both the opinion of the California Court of Appeal (App. B hereto, p. 13) and the Supreme Court (App. C hereto, p. 25 ff). It included vilification of defendant, personal attacks on its counsel[15] and witnesses, charged defendant with pressuring a witness into committing perjury, presentation of a rigged claimsman defense,[16] suppression of evidence, inhuman treatment of plaintiff for its own monetary gain and called upon the jury to "tell the Southern Pacific in that verdict it is high time to quit treating their employees that way."

The arguments included: "This isn't really 1964 at all," this goes back to "man's inhumanity to man long before they were savages"; never has anyone "been taken down the tubes

15. This is highly improper (*New York C. R. Co. v. Johnson*, footnote 16, below; *Missouri-K-T. R.Co. v. Ridgway*, 191 F2d 363, 370 (Cir. 8) quoting *Kroger Grocery etc. Co. v. Stewart*, 164 F2d 841 (Cir. 8); *Robinson v. Penn, R. Co.*, 214 F2d 798, 800 (Cir. 3); *Tampa T Lines v. Corbin*, 62 So2d 10, 12 (Fla.); *Love v. Wolf*, 226 CA2d at 391 (hr. den.)).

or down the drain like Mike Sabella"—"hey, Mr. Southern Pacific don't throw—don't dump him on the same trash pile where you dump those steel cars"—and this "after 36 years of loyal service"; plaintiff gets "nothing, except claimsmen out there to defeat the very purpose of what he did";[16] the "first thing they did was to set out to defeat him right from the beginning"; "They don't know how to play it fair" but Mike is having his day in Court "despite every roadblock they put there" and it is for the jury "to see after three and a half years that he gets the fair and just treatment for the first time"; the whole defense is to "smear a little on Mike"; "it stacks up to just one big game" and it is for the jury "to make sure that they are not going to get away with what they set out to do within a few minutes after this accident happened; thousands for defense, pictures, claimsmen, big lawyers—but nothing for Mike Sabella, a trusted employee for 35 years, and they call that fair play"; of a witness who was a supervisor "I wonder how many he's stepped on to get there"; don't permit the defendant to "throw up a smoke screen through their counsel"—"it's their job, and their job is to confuse" but "don't let him get that smoke too close to you";[17] the jurors "will be able to see through the sham and the shadows"; while plaintiff was on the way to the hospital defendant was "already out there taking aerial photographs * * * Imagine getting an airplane and camera equipment to start getting photographs to defeat a claim" (misstatements) and "the whole defense * * * is the testimony they created within minutes after this accident happened"; "* * * they were looking for a defense of this case right from

16. This Court has condemned the claimsman defense argument (*New York C.R. Co. v. Johnson*, 279 U.S. 310, 318).

17. See footnote 15, above.

the beginning * * * When it [evidence] is against them, they bring in less than what is the best. That is the whole story of this case."; "where is the claimsman with the rest of the pictures they didn't show? * * * All we get is a second best, a lousy evidence that they decide to bring in. You see, all the pictures that may show it to his advantage, you don't see them."; "maybe a clever man like McLaughlin can stand up there with a straight face and tell you things that you know are not true, and he knows they are not true, but the little working man may be scared of his job * * * What would happen to poor Medina if he didn't go along with it? * * * The report of Medina * * * guess who writes it out for him? * * * and how long do you think he would be out there if he didn't sign it? * * * 'I would like to help you, Mr. Teerlink, but I can't; I've got to send him down the tubes, it is him or me' * * *." There was a thinly disguised appeal to the jury to consider what they would take to exchange places with the plaintiff. There was a not so thinly disguised comparison of the financial situations of the parties and statement that without recovery plaintiff would be reduced to the condition of a beggar: Defendant employs 45,000 people and then, in contrast, "You don't get a silver spoon in you mouth if you spend 36 years with the Southern Pacific. * * * How does a man aged 59, who has a broken, who walks with a limp with a seventh grade education get a job?" "In the old days at least you could sell apples * * *" The defendant was charged with cutting off plaintiff's hospitalization and refusing him a job. And why all this? "* * * the real reason we are here: the reason is that here they can create a little confusion, get some of you people to short change him, and then they have won, because you folks cut down on what he is otherwise entitled to. That is just money back in the Southern Pacific

coffers. * * * because any time you cut it down, that is just more money back in their pockets."

Neither this summary nor even the shorter summaries of the California courts begin to give the color and flavor of the misconduct. Far more time was taken up in disparagement and vilification of the defendant and those associated with the defense than in attempting to discuss the evidence. Accordingly, in Appendix D we have set out the whole argument. This also shows how the defendant assigned misconduct and the failure of the trial court to give protection.

C. Defendant's Objections and Assignment of Misconduct

The majority opinion of the Supreme Court of California noted that the defendant did object but says that this was "to one distinct line of argument"—to defendant turning its back on plaintiff, refusing to help him or to give him a job and generally being out to defeat his claim.

With deference, the Court is in error. The following (page references are to Appendix D) is an enlargement upon footnote 1 in the dissenting opinion of Chief Justice Traynor showing the instances in which objection was made, the nature of the statements objected to, the objection and assignment of misconduct and the failure of the trial court to give protection:

1. *General Vilification of the Defendant—Charge of Inhuman Treatment of Plaitiff.*[18] At the beginning of the

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18. Compare conduct held improper in *San Antonio v. Timko*, 368 F2d 983, 986 (Cir. 2), —misconduct "so flagrant as to constitute 'fundamental error' (citing *Johnson*) which we will consider on appeal even though the point was not raised at trial."; *Robinson v. Penn. R. Co.*, 214 F2d 798, 801 (Cir. 3); *Missouri-K-T R. Co. v. Ridgway*, 191 F2d 363, 370 (Cir. 8); *Horn v. Atchison, T. & S.F. Ry. Co.*, 61 C2d 602, 609; *Keena v. United Railroad*, 197 Cal. 148; *Gockstetter v. Market Street Ry. Co.*, 130 CA 316, 326.

opening argument for plaintiff—the fourth paragraph of the argument as it is reported—came a charge of inhuman treatment of the plaintiff by defendant:

> "* * * I know in your hearts, as in my heart, after you saw the presentation of this case, that *I'll bet you are amazed and stunned beyond belief. This isn't really 1964 at all. This goes back to the early stages of man's inhumanity to man long before they were savages, because* * * * *never in the history of man could anyone have been taken down the tubes or down the drain like one Mike Sabella was.*
>
> And I say to you, ladies and gentlemen, that *the conduct of his employer, the Southern Pacific Company, in this case, is about as reprehensible in 1954* [sic]—
>
> Mr. Phelps (for defendant): Your Honor, *I am going to object to this line of argument and assign it as misconduct,* particularly in view of Your Honor's ruling that is keeping out of evidence the matter that I wanted to introduce * * * and *I will object and cite it as misconduct and ask for a mistrial.*
>
> The Court: Well, *the motion for a mistrial will be denied;* and I *suggest,* Mr. Teerlink, that you confine yourself to the evidence and such reasonable implications as you may draw therefrom."
>
> (p. 40)

The motion was specifically denied. There certainly was no sustaining of the objection, let alone other steps to protect the defendant.[19]

2. *Refusal of Hospital Care—Dumped on the Trash Pile.*[19]

"After you have been off work a year, *your benefits*

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19. Even sustaining the objection is not enough to cure the error, if it can be cured. (*Underwood v. Penn. R Co.*, 34 Ill. 2d 367, 215 NE2d 236, 238; *London v. Bay State etc. Co.*, 231 Mass. 480, 121 NE 394, 396. Cf. *Berger v. United States*, 295 U.S. 78, 85; *Hoffman v. Brandt*, 65 C2d 549; *People v. Wells*, 100 Cal. 459, 462.)

stop, as has been indicated, at the hospital, unless the Southern Pacific Company wants to pick them up.[20] * * * Hey, Mr. Southern Pacific, don't throw—*don't dump him on the same trash pile where you dump those steel cars.*[21] *This is a human being* you are talking about now.

What did they do? *Did they even agree to pick up $11.50 a month to see that the poor guy got his hospitalization?* No.

Mr. Phelps: If Your Honor please, *I am going to object* in view of the offer of proof I made in chambers as to what this man's actual situation was and the election he made and *I think it is misconduct* to encroach in the manner this has been done.

* * * The Court. Let's not go beyond the stipulation."

(p. 47)

The Court's ruling missed the point. Again, there was a failure even to sustain the objection.[22]

3. *Hospital Benefits—in Immediate Sequence.*

"What did they do, instead, ladies and gentlemen? *They cut off—no more hospital benefits,* no more out-patient, by the time of December[20]—

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20. The following was stipulated to (R. 344, 345): That Mr. Sabella had contributed to the fund of the Southern Pacific Department on June 25, 1961; that his rights under the Hospital Department—or under the Hospital Department Plan for in-patient benefits therefore expired as of July 31, 1962, and his rights under the same plan for out-patient benefits expired on December 31, 1962; that in view of that fact, Mr. Sabella is not entitled to any rights, either in-patient or out-patient benefits, after those dates; that the Southern Pacific Company was asked if they were agreeable to pay for the further care on their own account and declined.

See footnote 23, below.

21. Cf. *Robinson v. Penn. R. Co.*, 214 F2d 798, 801 (Cir 3)—the idea "is to take this man and make a nonentity out of him * * * as if the forty years of honest service had been nothing" and "kick you out like a sawdust bag."

22. See footnote 19, above.

Mr. Phelps: I make the *same objection* if Your Honor please, in view of the situation, my hands having been tied—

Mr. Teerlink: I say there are no benefits payable after December. That is the evidence.

Mr. Phelps: 'What did the Southern Pacific do when you'—

The Court: Let's—

Mr. Phelps:—*I object to that and assign it as misconduct.*

Mr. Teerlink: That is the evidence, Your Honor. He had no benefits after December.

The Court: I know, but you are going beyond that.

Mr. Phelps: You foreclosed me.

The Court: Let's stay within the confines."

(pp. 47, 48)

While there was suggestion by the Court to counsel again there was no clear sustaining of the objection. The defendant did not, of course, "cut off" any hospital benefits.[23]

4. *Unfairness in Presenting the Defense.*[24]

"And then the crowning glory, the last witness, just before we are to argue—not the first one in their case, so we could go to Los Angeles and bring up a few of the boys—That was—Do you think that was strategy? *This is the way they play the ball game. They don't know how to play it fair.* The last witness, ladies and gentlemen, is, lo and behold, McLaughlin—

Mr. Phelps: *I object and assign that as misconduct:* 'They don't know how to play it fair' There is a case that this very firm has been reversed for, argument of

23. See footnote 20, above. Knowingly to mis-state the fact is prejudicial misconduct. (*Hoffman v. Brandt,* 65 C2d 549; *People v. Ah Len,* 92 Cal. 282, 284; *Waldron v. Waldron,* 156 U.S. 361, 380; *Oslund,* footnote 25, below; *Ridgway,* footnote 18 above.

24. Compare footnotes 15 and 18, above, and footnote 27, below.

a similar nature, and *I assign it as misconduct and ask for a mistrial.*

The Court: Motion denied."

(pp. 49, 50)

This time the Court neither sustained the objection nor made a suggestion and counsel for the plaintiff, encouraged, continued:

"The last witness, ladies and gentlemen, low and behold, when he walked in, I almost dropped my false plates. If it wasn't old McLaughlin. Yes, siree, How about them barrel of apples? * * * he's just good old 'Mac.' *He's come a long way. I wonder how many people he's stepped on to get there.*"

5. *Misquotation of Counsel.*

"Now, we have had a lot of talk here. Then he said, 'the plaintiff is faking this thing,' the last * * * or words to that effect. This is what it meant.

Mr. Phelps: *I will object to that,* if Your Honor please, If he is going to quote me—

The Court: *It is a matter of semantics. He may comment.*"

(pp. 58, 59)

A clear *overruling* of the objection.[25]

6. *Size of Defendant—Refusal of a Job.*[26]

"They employ 45,000 people, and they couldn't find room for him to do anything—maybe even delivering the messages down at 65 Market Street; you mean to tell me, ladies and gentlemen, if you have got the good will of your employee at stake that you won't at least call him up and say—

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25. The court's remark only made matters worse. (Cf. *Oslund v. State Farm etc. Co.*, 242 F2d 813, 817 (Cir. 9).)

26. Cf. *New York C. R. Co. v. Johnson*, 279 U.S. 310, 319; *National Surety Co. v. Morlan*, 91 Colo. 164, 13 P2d 260; *Weaver v. Shell Oil Co.*, 129 CA 232, 234 (hr. den.).

> Mr. Phelps: I am going to *object* to this on the same ground and *cite it as misconduct.* Your Honor knows what the situation is. Your Honor knows what I was foreclosed from, and I think that this is improper argument.
> The Court: Just a moment.
> Mr. Phelps: Your Honor knows what the situation was.
> The Court: Let's keep it within the confines of the evidence."
>
> (p. 59)

Again, a failure to sustain the objection. Then in immediate sequence came the next improper statements.

6. *Suppression of Evidence—Misstatement of the Record.*[27]

> "Now, ladies and gentlemen, isn't it interesting to you, *when they've got all these pictures, where is that claims man with the rest of the pictures they didn't show?* He has been around here for two weeks and we haven't seen or heard from him.
> Mr. Phelps: Just a moment. He is implying—You told me you didn't want him this morning.
> Mr. Teerlink: Only—
> Mr. Phelps: You told me you didn't want him. I had him here at your request.
> Mr. Teerlink: Sit down and let me finish my argument."
>
> (p. 59)

In this instance the words "object" and "misconduct" were not used but that counsel for the defendant was making an objection is beyond question. Not only did the Court not rule but it included counsel for the defendant in a comment that

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27. See footnote 23, above. As to charge of suppression of evidence see *Ridgway,* footnote 18, above; *New York C. R. Co. v. Johnson,* footnote 26, above; *Keena v. United Railroads,* 197 Cal. 148.

could only have conveyed to the jury that the Court was impatient with the attempts of counsel for the defendant to protect his client. The Court said;

"All right, *gentlemen;* we have a time limit. Please."

7. *Misstatement of the Record.*[28]

"Does it seem ironical to you, ladies and gentlemen, that they can take *aerial photographs*—
Mr. Phelps: I—
Mr. Teerlink: Will you keep out of my argument?
—that they can take *aerial photographs* within a few hours or less than that? *Imagine getting an airplane and camera equipment and start shooting photographs to defeat a claim*—and rulers, when all they would have to do—* * *"

(p. 60)

Here counsel had no chance to object or assign misconduct. He was cut off—"Will you keep out of my argument."—and the Court permitted this [We suggest that to protect his record counsel is not required to engage in either a fist fight or a shouting contest.]

8. *Concocting a defense*[29]*—Suppressing Evidence.*

"Mike Sabella was lying on his back with a busted back thinking maybe they were going to do something decent for him, maybe once in a life the friendly Southern Pacific would be friendly. No, sir. *All we get is a second best, a lousy evidence that they decided to bring in.*

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28. See footnote 23, above.

29. Cf. *Robinson v. Penn. R. Co.,* 214 F2d 798, 801 (Cir. 3). Certainly the exercise of the right to make a defense (*In re Olivir,* 333 U.S. 257, 273; *Holt v. Virginia,* 381 U.S. 131, 136; *Skelly v. Kraimer,* 334 U.S. 1, 16; *Armstrong v. Manzo,* 380 U.S. 545, 550) is no basis for adverse comment.

You see, all the pictures that may show it to his advantage, you don't see them.

Mr. Phelps: Now—

Mr. Teerlink: They are not here.

Mr. Phelps: *I will object to that and assign it as misconduct.* This is, again, characteristic of the defense, and without any evidence, without justification, and the type of thing that the Courts have said is not proper, and I object to it."

(p. 61)

Far from sustaining the assignment and objection the Court clearly indicated to the jury that this type of argument was proper for *its only comment was "Go ahead."* Then in immediate sequence:

9. *Misstatement of the Record—Concocting a Defense.*[30]

"So the *whole defense* here, ladies and gentlemen, involves over whether Mike Sabella—this is the *testimony they created within minutes after this accident happened.* Now, with *all the resources at their command,* if it were really the findings, do you think they would have to go out and get some old boxcar and bring it in here, if they were careful enough to *hire an airplane to take aerial photographs within minutes,* to take—have a claims manager in there—

Mr. Phelps: No evidence of that, if Your Honor please, absolutely none. It is not the fact."

(pp. 61, 62)

Again, counsel for defendant did not use the magic words, but he was clearly objecting and stating the ground of objection. *The Court did nothing.* The line of argument continued:

"Beautiful pictures. But you only get what they want you to see" etc.

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30. See footnotes 23 and 29, above.

10. *Pressuring a Defense Witness into Committing Perjury.*[31]

> "Now, what about poor Mr. Medina (a witness for defendant)? What do you think poor Mr. Medina must think when he sees and he knows what they are doing to Mike? *What would happen to poor Medina if he didn't go along with it?* Ever think about that?
> *When they see how they threw him on the human trash pile, how quick would they give it to Medina if he didn't go along—*
> Mr. Phelps: Your Honor, *I object again and cite this as misconduct* in view of the fact I was foreclosed from proving that isn't the fact as to what we did or what was done for this man, and I can not stand still and listen to this, knowing the facts are."
>
> (pp. 63, 64)

The Court did nothing and counsel for plaintiff, encouraged, in immediate sequence went on:

11. *Pressuring Witness into False Statements.*[32]

> "The report of Medina that he signs—Do they let Mr. Medina sit down and write his own report as to what happened? No, sir. *Guess who writes it out for him? He just signs it.*
> "I asked him, 'Is that your handwriting?'
> "No, that is my signature.'
> You can readily see that it is not. *Somebody else comes in and says, 'Mr. Medina, sign it.'*
> *And how long do you think he would be out there if he didn't sign it?*
> Then, when we took a deposition of him * * * you can look at the sorrowful look in a man's eyes when you are taking his deposition, and they cry out to you, *'I would*

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31. Cf. *Atchison, T. & S.F. R. Co. v. Dewelle*, 44 Kan. 394, 24 P. 500; *Underwood v. Penn. R. Co*, 34 Ill. 2d 367, 215 NE2d 236, 239.

32. See footnote 31, above.

like to help you, Mr. Teerlink, but I can't; I've got to send him down the tubes; it is him or me,' and that is the way you see it.

Mr. Phelps: If Your Honor please, 'down the tubes,' when this man is down—the situation is such, Your Honor please, I am foreclosed from saying it—

Mr. Teerlink: You said it about figures 14 times.

Mr. Phelps: The ruling—

Mr. Teerlink: You haven't given him a job; that is for sure.

Mr. Phelps: That is just—now, there we go again. If Your Honor please, instruct Mr. Teerlink to desist from that. *I cite it again as misconduct and move for a mistrial* in view of that offer I made of proof.

The Court: *Denied. Proceed.*"[33]

(p. 64)

Again, the Court, far from sustaining the objection, indicated approval of the line of argument by telling counsel to proceed.

Defendant's position was made clear. It was asking the court for protection. Indeed, had it gone further and asked the court to admonish the jury after the court had declined to sustain an objection and citation of misconduct or flatly overruled the objection and assignment, Counsel for defendant could have been charged with acting in defiance of the court's rulings.

D. Verdict and Proceedings on Motion for New Trial

The jury returned a verdict in favor of plaintiff for $115,500.00 (R. 88) on which judgment was entered (R. 89; App. A, p. 1).

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33. See commenting on rulings which seem to lend approval to misconduct. *N.Y.C. R. Co. v. Johnson*, 279 U.S. 310, 318; *Boyd v.* Theetgee, 78 CA2d 346, 351; *People v. Wilkes*, 44 C2d 679, 686-88; *Oslund*, footnote 25, above.

The defendant moved for a new trial (R. 92), specifying as grounds, among others, the following statutory grounds:

> "1. Irregularities in the proceedings of the Court by which defendant was *prevented from having a fair trial;*
>
> * * *
>
> 3. Irregularities in the proceedings of the plaintiff and his attorneys by which defendant *was prevented from having a fair trial;*
>
> 4. Orders of the Court by which defendant *was prevented from having a fair trial;*
>
> * * *
>
> 9. Excessive damages, appearing to have been given under the influence of passion or prejudice;
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> 10. Insufficiency of the evidence to justify the verdict;
>
> 11. The verdict is against law;
>
> 12. Errors in law occurring at the trial and excepted to by the defendant." (R 92)

Defendant's motion was supported by the record, an affidavit of counsel for defendant (R. 97ff) and a memorandum (R. 108ff). Both in the affidavit (R. 100ff) and in the memorandum (R. 155) the defendant set up the misconduct of counsel for plaintiff.

The trial court, ruling on defendant's motion for new trial (App. A hereto, p. 3), finds as follows:

> That the evidence is insufficient to sustain the verdict of the jury;[34] and
>
> There was error in law, occurring at the trial and excepted to by the defendant, and that such error was prejudicial,

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34. This ground is specified because Cal. CCP § 657, as to this ground, and at that time only as to this ground, provided: "When a new trial is granted * * * upon the ground of the insufficiency of the evidence to sustain the verdict or decision, the order shall so specify this in writing * * * otherwise, on appeal from such order it will be conclusively presumed that the order was not based upon that ground."

> Now, THEREFORE, it is ordered that if by Friday, April 2nd, 1965, the plaintiff files his written consent to a modification of the judgment so that the same will award damages to plaintiff in the sum of $80,000.00, the judgment shall be modified accordingly and the defendant's motion for a new trial be, and it is, hereby denied. If said plaintiff fails to file such written consent to modification, as above set forth, within said time, then and in that event defendant's motion for a new trial will be, and the same is, hereby granted on the ground of insufficiency of the evidence to justify the verdict,[34] and error in law, occuring at the trial and excepted to by the defendant, with said error was prejudicial."

Within the time prescribed the plaintiff filed the required consent (R. 161).

The Supreme Court of California describes the order of the trial court denying a new trial conditioned on the remission of $35,500.00 as an attempt, upon the part of the trial court, to correct the error in sustaining objection to the testimony offered by defendant (see p. 11, above). It said, referring to this question of evidence:

> "We find it unnecessary to resolve this close question of prejudice and probative value. Upon motion for a new trial, the Court obviously decided it should have admitted the evidence in question and proceeded to order the remittitur. In short, the Court deemed that all the evidence, *including* that which it rejected but later determined should have been admitted, was insufficient to support the amount of the award."

It added by footnote 2 that

> "the Court's remittitur does not imply a finding of passion or prejudice."

In footnote 3 it said:

> "In any event, the trial court impliedly found no misconduct, or at least no prejudice, when ruling on the motion for new trial."

By what process of divining the Supreme Court arrived at the conclusion that the trial court ascribed the excessiveness of the verdict to the error in excluding evidence and denied a new trial conditioned on a remittitur of $35,500.00 to cure that error, rather than ascribing the excessiveness to the improper arguments and appeals to passion and prejudice[35] and trying to use remittitur procedure in an attempt to cure the prejudice resulting from this, the Supreme Court never makes clear. With deference, there is nothing in the trial court's order to support this conclusion. If the verdict is excessive because not supported by the evidence what then induced it? Misconduct?

The Court of Appeal was of a view different from that of the Supreme Court. (App. B, p. 13ff)[36]

The only thing that is clear is that if the Supreme Court had held that the remittitur served to cure the denial of a fair trial resulting from misconduct in argument to the jury the holding would have been in head-on collision with the decision of this Court in *Minneapolis, St. Paul etc. Ry. Co. v. Moquin,* 283 U.S. 520.

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35. If as the trial court found, the evidence was insufficient to justify the verdict, to what else is the verdict to be ascribed?

36. The Court of Appeal said: "But it is not clear, as it is in cases where there is an outright denial of new trial, that the court decided that there was no prejudicial misconduct. Misconduct of counsel is not specifically mentioned by statute as a ground for new trial. * * * It may well be that the experienced trial judge attempted to correct the judgment by reduction in amount, *even though the excess had been produced wholly or in part by misconduct.* * * * We do not regard the reduction itself as a sufficient correction of misconduct. * * * *It is not possible to know what the verdict would have been in the absence of misconduct.*"

E. Decision of the Court of Appeal of California for Reversal

Defendant appealed to the California Court of Appeal, First Appellate District, Division Four. (R. 162) On that appeal it presented (by record and briefs), and the Court passed upon, the misconduct of counsel for plaintiff (App. B, p. 13 ff). The conclusion of the Court of Appeal, "considering the whole record of the case," was "that the judgment must be reversed because of misconduct of counsel, as shown below." It reviewed the misconduct and then took up the way in which the misconduct had been assigned in the trial court. It said:

> "Respondent points out that counsel for the defense did not request admonitions to the jury."

Stating that this was proper practice "and in some cases may be essential" it concluded:

> "But in the case at hand there were three motions for mistrial and nine citations of misconduct. *We are not disposed to say that conforming with a precise ritual is always necessary in protesting a series of offenses.*[37] (See *Love v. Wolf,* 226 Cal. App. 2d 378, 392). Nor do we try to calculate exactly how much harm was done by the misconduct. (*Love v. Wolf, supra,* p. 394)."

F. Decision of the California Supreme Court for Affirmance

The Supreme Court of California granted a petition for a hearing by that Court and transferred the cause to the Supreme Court.[38] The same points by brief were made[38] and

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37. See footnote 4, p. 4, above.

38. This had the effect of transferring the whole cause to the Supreme Court and setting it at large for decision there upon the entire record as though the appeal had been lodged there in the first instance. (Cal. Appellate Rules, Rule 28(a); *Moran v. District Court of Appeal,* 15 C2d 527, 530; *Ponce v. Marr,* 47 C2d 159, 161; *Chavez v. Sargent,* 52 C2d 162, 188 fn. 10).) Under the California practice this brings over the record and briefs from the Court of Appeal and the case is submitted on those briefs and argument unless additional briefs are permitted.

passed upon. (App. C, p. 25 ff) The Supreme Court very briefly summarized some of the improper remarks of plaintiff's counsel and was willing to assume that they were both misconduct and prejudicial. Its characterizations have been quoted above at p. 3 and need not be repeated. It concluded, however, that defendant failed "to take proper steps to preserve the latter issue of prejudice on appeal."

The Supreme Court, with deference, did little to support its conclusion. It quoted California cases for a common practice of requesting that the jury be admonished "where such admonition could be effective." It cited no Federal case. It cited no case that refused review for failure to request an admonition where the misconduct was planned and deliberate, repeated and persistent,[39] and continued in the face of assignments of misconduct clearly and repeatedly made. It cited no case requiring such a request where an admonition would not have been effective,[40] or where the Court did not act though objection was made.

Conceding that defendant "did object, however, to one distinct line of argument" the Supreme Court stated that the defendant was "silent as to all but one line of argument," i.e. that defendant turned its back on plaintiff, refused to

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39. Cf. *Berger v. United States*, 295 U.S. 78, 89; *Straub v. Reading Co.*, 220 F2d 177, 182 (Cir. 3); *Robinson v. Penn. R. Co.*, 214 F2d 798, 801 (Cir. 3).

40. The Supreme Court noticed that "Reference was made to the disparity in wealth between plaintiff and defendant." This is the type of misconduct, —reference to the financial situation of the parties—which *Hoffman v. Brandt*, 65 C2d 549 held, although it was the *single* instance of misconduct in the case, was the type of misconduct as to which "an admonition * * * could not have been effective under the circumstances," according to the majority opinion in the case at bar. (Cf. *Ensign v. S.P. Co.*, 193 Cal. 311; *Nakamura v. L.A. etc. Co.*, 137 CA 487, 490; *Carlson v. Shenson*, 47 CA2d 52, 60.) An admonition here would have been "like trying to unring a bell." (*Love v. Wolf*, 226 CA2d 378, 392, (hr. den.).)

help him and generally was out to defeat his claim. With deference, its statement is inaccurate. This is demonstrated above at p. 15ff. In statements *assigned as misconduct* the defendant was generally vilified, charged affirmatively with inhuman treatment of plaintiff and unfairness in presenting the defense—"they don't know how to play it fair." There was misquotation of counsel, reference to the size of defendant—and, necessarily, reference to its financial situation—a charge of suppression of evidence, a deliberate misstatement of the record in connection with the claimed aerial photographs, again charging the defendant with concocting a defense and suppressing evidence, a second reference to the same subject, creating evidence, pressuring a defense witness into committing perjury, and pressuring a witness into signing false statements and perjuring himself upon deposition.

The only other support for its conclusion is the Court's statement that objection came as a "tardy point." Again, with deference, Appendix D shows that the first assignment of misconduct came early in plaintiff's argument. (App. D, p. 40).

The decision comes to this: In an F.E.L.A. case there will be no relief from denial of a fair jury trial by gross, wilful and persistent—"deplorable"—misconduct in argument to a jury, although there were objections and assignments of misconduct which made defendant's protests clear, unless just the right words are used—unless there is a request that the court admonish the jury to disregard the statements where, it is submitted, the trial judge could not have been in the dark as to what was involved, an admonition would not have cured the situation if given,[41] and where it is apparent

41. No request for an admonition is required where, if given, it would have been ineffective. (See footnote 40, above; *People v. Simon,* 80 CA 675, 679; *Osland,* footnote 25, above.)

that the trial court would have given no admonition, if it had been requested, because it refused to sustain, and in fact *overruled,* objections when made.

VI

REASONS FOR ALLOWANCE OF THE WRIT

The State Supreme Court has decided a federal question of substance in a way not in accord with applicable decisions of this Court.

New York Central R. Co. v. Johnson, 279 U.S. 310, 318 holds that prejudicial misconduct in argument to a jury by appeals to passion and prejudice can not be ignored because, so it was claimed, the objection was not in form sufficiently specific. (See this case quoted in footnote 6, p. 4, above.)

Minneapolis, St. Paul etc. Ry. Co. v. Moquin, 283 U.S. 520, is closer and on all fours. It was a Federal Employers' Liability Act case. This Court took over the case and reversed the state court where there was misconduct and where a new trial, moved for "on the ground that misconduct of respondent's counsel in making appeals to passion and prejudice had prevented an impartial trial," had been denied. As in the case at bar the state court had said that the state practice "required counsel to interrupt * * * to ask the Court to instruct the jury to disregard" the improper remarks and to except. (283 U.S. at 520) The state court further had said: "No objections or exceptions were made and taken at the time of argument. The record was not protected." While "it may become the duty of the court to act on its own motion" still, the state court went on, "The rule of procedure in such cases rests upon deep principles from which we shall not depart. It is the settled practice." The state court did, however, order a new trial on the ground "that the verdict is excessive because of passion and prejudice" unless a remit-

titur were filed. (181 Minn. 56, 231 NW 829, 932 col. 2, 833.) This Court declined to be bound by the state practice.[42] It held (283 U.S. at 521);

> *"Nor need we inquire into the rules applicable in trials under state law.* Whether *under the state's jurisprudence* the present record would entitle petitioner to a new trial or to such a conditional order as was awarded *is immaterial.*
>
> *In actions under the Federal statute no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice.* Obviously such *means* may be quite as effective to beget a wholly wrong verdict as to produce an excessive one. A litigant gaining a verdict thereby will not be permitted the benefit of calculation which can be little better than speculation, as to the extent of the *wrong inflicted upon his opponent."*

Moquin is an example of the broad rule, frequently applied by this Court in F.E.L.A. cases, that "the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice" (*Arnold v. Panhandle etc. Ry. Co.,* 353 U.S. 360, 361; *Atlantic C.L.R. Co. v. Burnette,* 339 U.S. 199, 201; *Central Vermont R. Co. v. White,* 238 U.S. 507; *Norfolk So. R. Co. v. Ferebee,* 238 U.S. 269, 273) and that "a right to trial granted by Congress" [and this means trial by jury[43] and a *fair* trial] "cannot be

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42. Compare the Federal rule that there are times when a trial court "should have stopped counsel's discourse *without* waiting for an objection." (*Viereck v. United States,* 318 U.S. 236, 247; *Berger v. United States,* 295 U.S. 78, 88. *San Antonio v. Timko,* 368 F2d 983, 986 (Cir. 2); note 18, above.)

43. *Foust v. Munson Steamship Lines,* 299 U.S. 77, 83 (*Jones Act*); *Jacob v. New York,* 315 U. S. 752 (*Jones Act*); *Bailey v. Central Vermont R Co.,* 319 U.S. 350, 353; *Blair v. Baltimore & O. R. Co.,* 323 U.S. 600, 602; *Rogers v. Missouri Pac. R. Co.,* 352 U.S. 500, 509.

defeated by the forms of local practice" (*Brown v. Western Ry. of Alabama,* 338 U.S. 294, 296, 299; *Dice v. Akron etc. R. Co.,* 342 U.S. 359, 361, 363; *Brady v. So. R. Co.,* 320 U.S. 467, 479). Where a state court has denied the fair exercise of the right of trial by jury in F.E.L.A. cases this Court has found it particularly appropriate to issue its writ. *Rogers v. Missouri Pac. R. Co.,* 352 U.S. 500, 509, said:

> "Cognizant of the duty to effectuate the intention of the Congress to secure the right to a jury determination this Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination."

Brown v. Western Ry of Alabama, above, at p. 299, said:

> " 'Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice' *David v. Wechsler, supra* (263 U.S. at 24, 68 L ed 145, 44 S Ct. 13). Cf. *Maty v. Grasselli Chemical Co.,* 303 U.S. 197, 82 L ed 745, 58 S Ct. 507. Should This Court fail to protect federally created rights from dismissal because of over-exacting local requirements for meticulous pleadings, *desirable uniformity in adjudication of federally created rights could not be achieved."*

Acc., *Dice v. Akron etc. R. Co.,* 342 U.S. 359, 361, 363, above.

"What is here involved is the Court's supervisory power over the administration of" justice under a Federal statute. (Cf. *Elkins v. United States,* 364 U.S. 206, 216; *Thiel v. So. Pac. Co.,* 328 U.S. 217, 225.) The writ should issue for the reason it issued in *Davis v. Virginian R. Co.,* 361 U.S. 354, 355—because "the question posed was of importance in the uniform administration of the federal statute." The matter

of concern is of the health of the jury process[44] and its administration when used under a federal statute which contemplates trial by jury (see p. 6, above and footnote 43, above).[45]

Wherefore, it is prayed that the writ of certiorari of this Court issue to the Supreme Court of California to certify up its record that its judgment may be corrected and reversed.

San Francisco, California, April 24, 1969

ARTHUR B. DUNNE,
Attorney for Petitioner
Southern Pacific
Company

---

44. See footnote 2, above.

45. The Supreme Court of California seems to treat too lightly improper and prejudicial argument to a jury that denies a fair trial. (Cf. *Chapman v. California,* 386 U.S. 18, 22.)

[Appendices Follow]

PROOF OF SERVICE

I certify that I am a member of the bar of the Supreme Court of the United States and counsel for Southern Pacific Company, the petitioner in the foregoing petition for certiorari and the party in behalf of whom the service herein stated has been effective; that the persons upon whom service was made were the counsel of record for the respondent Mike Sabella, in the California courts in the action dealt with in the foregoing petition and reside within 500 miles of San Francisco, California, where I reside and have my office; that on the 24th day of April, 1969 I served 3 copies of the foregoing petition upon said counsel for respondent by enclosing them in a sealed envelope and depositing that envelope in a United States mail box in San Francisco, California, with first class postage thereon prepaid and addressed to said counsel at their post office address as follows:

Edward J. Niland, Esq.
Boccardo, Blum, Lull, Niland
Teerlink & Bell
111 West St. John Street
San Jose, California 95113

ARTHUR B. DUNNE
Attorney for Petitioner
Southern Pacific Company

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Appendix A

In the Superior Court of the State of California
in and for the City and County of San Francisco

Department Number 15

Honorable Clayton W. Horn, Judge

No. 529,923

Mike Sabella,

Plaintiff,

vs.

Southern Pacific Company,
a corporation,

Defendant.

Entered Vol. A136, Page 3, February 1, 1965.
Martin Mongan, Clerk. By: D. Panattoni, Deputy Clerk.

JUDGMENT ON VERDICT

Dated: February 1, 1965

This cause came on regularly for trial, Messrs. Boccardo, Blum, Lull, Niland, Teerlink & Bell, by Heber Teerlink, Esq., appearing as counsel for the plaintiff, and Messrs. Dunne, Phelps & Mills, by Louis L. Phelps, Esq., for the defendant.

Thereupon, a jury of Twelve persons was duly accepted, empaneled and sworn to try said cause. Witnesses on the part of the plaintiff and defendant were duly sworn and examined, and certain documentary evidence was introduced.

Whereupon, after hearing the evidence, the arguments of Counsel and instructions of the Court, the cause was sub-

mitted to the jury, who retired to deliberate upon their verdict, and subsequently returned into court, and, being called, all answered to their names, and then rendered the following verdict, which was accepted by the Court and entered on the minutes, as follows:

We, the jury in the above entitled cause, find a verdict in favor of the Plaintiff, Mike Sabella, and against the Defendant, Southern Pacific Company, a corporation, and assess the damages in the sum of ($115,500.00) .... dollars.

John G. Badgis, Foreman

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered, adjudged, and decreed, that Mike Sabella, plaintiff, do have and recover from Southern Pacific Company, a corporation, defendant, the sum of One Hundred Fifteen Thousand Five Hundred and no/100 ..... Dollars ($115,500.00) with interest thereon at the rate of seven per cent per annum from the date hereof, till paid, together with said plantiff's costs and disbursements incurred in this action, amounting to the sum of $..... (R 89, 90)

Superior Court of the State of California
for the City and County of San Francisco

Department No. 15

Vol. 672, Page 318 March 29, 1965 Dept. No. 15
Hon. Clayton W. Horn, Judge Presiding.

Filed March 29, 1965
Martin Mongan, Clerk. By: F. G. McGreevy, Deputy Clerk.

(TITLE OF COURT AND CAUSE)

Heretofore sumbitted:

The motion of the defendant for a new trial in the above-entitled cause having come on regularly for hearing and having been submitted to the court for decision after argument, the court finds as follows:

That the evidence is insufficient to sustain the verdict of the jury; and

There was error in law, occuring at the trial and excepted to by the defendant, and that such error was prejudicial.

Now, therefore, it is ordered that if by Friday, April 2nd, 1965, the plaintiff files his written consent to a modification of judgment so that the same will award damages to plaintiff in the sum of $80,000.00, the judgment shall be modified accordingly and defendant's motion for a new trial be and it is hereby denied. If said plaintiff fails to file said written consent to modification, as above set forth, within said time, then and in that event defendant's motion for a new trial will be, and in the same is hereby granted on the ground of insufficiency of the evidence to justify the verdict and error in law, occurring at the trial and excepted to by the defendant, which said error was prejudicial.

Dated: March 29, 1965

CLAYTON W. HORN

Judge of the Superior Court

(R 177, 178)

(TITLE OF COURT AND CAUSE)
Filed April 2, 1965
Martin Mongan, Clerk
By: R. W. Sotter, Deputy Clerk

CONSENT TO MODIFICATION OF JUDGMENT

Comes Now the plaintiff and consents to a modification of the judgment from $115,500.00 to $80,000.00.

Dated: This 1st day of April, 1965.

BOCCARDO, BLUM, LULL, NILAND,
TEERLINK & BELL

By /S/ HEBER N. TEERLINK
Heber N. Teerlink
Attorneys for Plaintiff

(R 161)

(Certification of mailing attached.)

Appendix B

In the
Court of Appeal
of the
State of California
First Appellate District
Division Four

1 Civil No. 23,203

[262 ACA 582, 68 Cal. Rptr. 896]

Mike Sabella,
Plaintiff and Respondent,
vs.
Southern Pacific Company,
Defendant and Appellant.

OPINION.

This is an appeal from a judgment in the amount of $80,000, in an action brought under the Federal Employers' Liability Act. The jury's verdict was for $115,500, but consent to reduction was made by the plaintiff, in compliance with a conditional order granting new trial. The issues are admissibility of evidence of a disability pension and misconduct of counsel.

Mike Sabella, plaintiff, was 56 years old at the time of the accident, and had worked as a carman cutter for defendant for 32 years. He and two others were assigned to the work of cutting damaged freight cars into scrap. When a car is demolished, the entire roof must be removed. The cutting is done by acetylene torch.

Plaintiff's original manner of doing his work was to cut one piece of the roof and wait for the crane to remove that section before going to another. Thus, only a single section was movable. The roof is usually cut into five sections. Because this procedure caused delay in waiting for the crane, the general foreman told plaintiff he must cut the entire roof, call the crane, and get all the sections off (one by one) at one time. This testimony was not contradicted.

Plaintiff and Thomas Richardson, one of the other cutters, both testified that plaintiff used a precaution which Richardson did not, that is, plaintiff would leave at certain places along the roof line strips of metal called "tacks." This had a double purpose: it helped to prevent a section which was being cut by the torch from falling into the car; and when tension would cause a tack to break, Sabella would hear it "pop" and would be alerted to possible instability of the section. These tacks were broken when the section was lifted by the crane. The railroad supervisor, George W. Jehue, who had cut only two or three roofs in his 29 years with the railroad, testified that the correct procedure was to leave "tacks" three to six inches wide which would be cut by the torch when the crane arrived. However, he had never instructed the cutters to use this method, and there were no printed rules or regulations. According to plaintiff, the men were "sent out there to cut cars as scrap, and that was all."

On the day of the accident, plaintiff testified, he had cut the roof in the manner described. When the crane arrived, he stood on the roof and placed the lifting hooks into holes which he had cut in the roof sections. He then told the crane operator not to move a thing until he was off the roof. The first two sections were removed without incident. However, he testified that after he had inserted the hooks into two of the remaining sections, the one on which he was

standing jerked as he was walking away, causing him to fall into the car.

The crane operator testified that he merely took up the slack of the cables, and Sabella just disappeared after taking a couple of steps. He admitted that the sections had moved, but "barely." In his deposition he stated that after the accident the edges of the sections stuck up above the top of the car a couple of feet. On the witness stand he reduced this to one foot.

It was the defense theory that Sabella had improperly cut the roof, by failing to leave enough overlap to support the roof sections on the sides of the car. Much of the defense was based on photographs.

Besides plaintiff's theory that the crane operator had negligently moved the roof section on which he was standing, thus causing his fall, he relied on the failure of defendant to provide a reasonably safe place in which to work.

A fair summary of the case made for the purpose of assessing the effect of misconduct is this: a firm, although not completely compelling case was made by plaintiff for defendant's liability; contributory negligence which might reduce an award under F.E.L.A. law, was reasonably arguable.

Plaintiff, having fallen on the base of his spine, suffered a compressed fracture of vertebrae. It was the opinion of Dr. Michael Bluhm, who testified for him, that plaintiff's complaints of continuous pain and restricted motion of the back were consistent with his history and the X-ray findings. He testified that Sabella could not do the job which had been his. He expected whatever pain and discomfort Sabella had would continue. Sabella testified that he was in pain every day, that he was wearing a brace and that he could not be on his feet for more than about an hour at a time. Dr. Waldo

Newberg testified for the defense. He said that the compressed fracture was minimal, that there is no objective evidence for disability sufficient to keep the patient from working, that he had exaggerated response to a light touch, and that although it was his opinion and that of his associates that plaintiff had recovered, they recommended him for duties with 25 pounds' lifting restriction and no work around moving equipment.

Perhaps the most prominent issue in the case, and surely the one which gave rise to an impassioned argument to the jury by plaintiff's counsel, was that of availability of work with the railroad. In his opening statement, plaintiff's counsel said that with the 25-pound limitation plaintiff could not work as a carman and that the railroad did not offer him any other job, even as delivery boy. Defense counsel replied that there are jobs which could be done even with plaintiff's restriction.

Plaintiff testified that he knew of no job with limited lifting which he could do, and that the railroad had not offered him any other kind of job. He was not cross-examined about this. The defense produced testimony from a superintendent of the mechanical department, McLaughlin, to the effect that a job as tool room custodian would be available. Sabella would have to return to his original job and then "if it should be developed in his work that he does not wish this job (a job from which, indeed, he was barred by the medical restrictions), usually a local arrangement could be made to have the job abolished and then he could "bump" the junior occupant of the tool room job. However, many of the tools are heavy and a man with plaintiff's restrictions would have to call on others for help. There was no testimony that this superintendent had ever contacted Sabella or that an offer of a job had been made to him. Sabella, in reply, testified

that he had gone in company with union representatives in January 1963 to the yard area in Los Angeles, had met the master car repairman, whose name he gave, that the tools were weighed, and that the smallest motor was 35 pounds. Apparently, the interview ended shortly. No rejoinder to this testimony was offered by defendant. Although Sabella's testimony on this point came late in the trial, appellant made no point on its motion for new trial that it was taken by surprise.

EVIDENCE RELATED TO PLAINTIFF'S RETIREMENT PROCEEDINGS.

Appellant asserts that it was error for the trial court to exclude evidence which would have shown that plaintiff had applied for a disability pension under the Railroad Retirement Act.

Appellant, in its motion for new trial, relied upon the exclusion of the evidence as a prejudicial error of law. One of the two grounds cited by the judge for granting his conditional order for new trial was prejudicial error in law occurring at the trial and excepted to by defendant. The parties agree that the reference to an error in law was the ruling discussed herein, because it was the only one argued on motion for a new trial. (At the time of the granting of the motion, on March 29, 1965, it was not required, as it now is by amendment to section 657 of the Code of Civil Procedure, that *reasons* for granting a new trial specified). Appellant argues that when there has been prejudicial error of law, the court must grant a new trial outright, and not made conditional on remittitur. Respondent replies that there was no error at law. Respondent is entitled to take this position even though he did not appeal. (Code Civ. Proc., § 956).

The way in which the proffer of evidence was made to the court was this: Counsel for plaintiff proposed to read questions on a printed form which were put to Dr. Calvin, a physician at the Southern Pacific Hospital, and the doctor's answers given on January 14, 1963. Counsel for defendant agreed "provided that all parts germane also be read." The first question was, "May applicant's condition be expected to improve?" which was answered by check mark against "No." The second question, "Applicant able to work in last occupation?" was answered by check mark against "No" and "At Present." "May applicant be able to work in last occupation in the future?" was answered by check mark in the "No" box. Next appears: "Type of work: Limitation to 25 pounds weight lifting, and no climbing or working on moving railroad equipment."

Counsel for the defense attempted in his case-in-chief to show, by reading the form in its entirety and a letter from the Railroad Retirement Board, that the questions and answers were related to an application by plaintiff for a disability pension. Objection was made on behalf of plaintiff on the ground of ruling in *Eichel v. New York Central R. R. Co.*, 375 U.S. 253, that such evidence is inadmissible because "it would violate the spirit of the federal statutes if the receipt of disability benefits under the Railroad Retirement Act . . . were considered as evidence of malingering by an employee asserting a claim under the Federal Employers' Liability Act" (p. 255). The Supreme Court remarked that a showing of the workman's receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact. The court said that "Insofar as the evidence bears on the issue of malingering, there will generally be other evidence having more probative value and involving less likelihood of prejudice than the receipt of a disability pension" (p. 255).

Whether the *Eichel* case is binding on state courts as announcing a rule amounting to substantive law, which is controlled in F.E.L.A. cases by federal rules (*Davee v. Southern Pacific Co.*, 58 Cal. 2d 572), or is not binding, as a decision on evidence only (*Showalter v. Western Pacific Railroad Co.*, 16 Cal. 2d 460), we need not decide. In the application of state law, the unanimous decision of the United States Supreme Court in the *Eichel* case, which has been said to express a strong public policy (*Page v. St. Louis Southwestern Railway Co.*, 349 F. 2d 820), must be accorded great respect.

We conclude that it was not error for the court to exclude the evidence. The principle referred to in the *Eichel* case, of excluding evidence that is harmful to a party and which is of comparably less value for legitimate purposes, is recognized by the law of this state. Presently, it is expressed in section 352 of the Evidence Code. This section had not been enacted at the time of the trial, but the rule had been approved earlier. (See Note of the Law Revision Commission to Evidence Code section 352).

Appellant's first theory is that the evidence was admissable by reason of stipulation between the parties. But the stipulation by respondent was only that those parts of the questionnaire and its transmittal letter which were "germane" would be admitted. In fact, appellant did read into the record, without objection, a number of questions and answers in which Dr. Calvin stated that plaintiff's complaints of pain were subjective only. These were indeed germane.

Appellant asserts that the questions and answers of Dr. Calvin were used in the cross-examination of Dr. Newberg, and that it should have been permitted to appellant to show that Dr. Calvin had replied to the Railroad Retirement

Board without ever having examined plaintiff and solely by reference to the hospital records. But Dr. Newberg had testified even before the cross-examination that it had been impossible to rehabilitate Sabella. He and other doctors had recommended duties with 25 pounds' weight lifting restriction and no work around moving equipment. Appellant also proposed to have Dr. Calvin testify that when he answered "No" to the Railroad Retirement Board's question whether Sabella could be expected to improve, he meant that if Sabella had the security of a disability pension he would not be expected to improve. We believe this reason would not be of sufficient weight to overcome, on the issue of admissibility, the prejudicial effect of showing collateral compensation.

Appellant's second theory of the admissibility of the evidence is that it would show that plaintiff's true purpose was not to return to work even if he were able, but to retire. Appellant argues that when plaintiff's counsel told the jury in his opening statement that the railroad in effect refused Sabella a job, he opened the subject, so that the defense was entitled to show that Sabella had voluntarily taken his disability pension. This goes to the very heart of the rule banning evidence of the collateral compensation. In order to get a disability pension, as distinguished from an annuity for service only, the workman must show that his permanent physical or mental condition is such as to be disabling for work in his regular occupation (besides proving twenty years of service or attainment of the age of sixty). (45 U.S.C. § 228b, subd. 4). Thus, if on the one hand it be conceded that he is so disabled, he is entitled to compensation which is purely a collateral recovery. If he is not so entitled, it may be because he is not truly disabled but is malingering. Admission of evidence of disability pension to show malingering is what was condemned in the *Eichel* case.

Appellant argues that the motive for plaintiff to seek the pension may have been simply a desire to retire, and that it should be permitted to show this, independently of any charge of malingering. It is difficult to escape the connotation of malingering because of the nature of a pension obtained by reason of disability. But, in any event, the existence of the pension as the employee's motive for asserting disability following an injury cannot be put in evidence. (*Eichel v. New York Central R. R. Co., supra,* 375 U.S. 253; *Caughman v. Washington Terminal Co.,* 345 F. 2d 434).

MISCONDUCT OF COUNSEL

We have concluded, on considering the whole record of the case, that the judgment must be reversed because of misconduct of counsel, as shown below.

Respondent argues that because the order granting new trial refers to insufficiency of the evidence and errors of law but contains no reference to misconduct of counsel, the court must have rejected appellant's contention in this regard, at least in so far as prejudicial misconduct is concerned, and that such a decision by the trial court should not be disturbed on appeal unless it is clearly wrong. (*Lafargue v. United Railroads,* 183 Cal. 720, 724; *Wills v. J. J. Newberry Co.,* 43 Cal. App. 2d 595, 607-608).

But it is not clear, as it is in cases where there is an outright denial of new trial, that the court decided that there was no prejudicial misconduct. Misconduct of counsel is not specifically mentioned by statute as a ground for a new trial. (Code Civ. Proc., § 657). At the time the order was made the judge was not obliged (as judges now are) to give the grounds for his order, except that if insufficiency of the evidence were one of the grounds this had to be stated in writing. It may well be that the experienced trial judge attempted

to correct the judgment by the reduction in amount, even though the excess had been produced wholly or in part by misconduct. For although he decided that there was a prejudicial error of law, he did not grant a full new trial, but apparently intended also to rectify that which he deemed to have been error, by the remittitur.

We do not regard the reduction itself a sufficient correction of the misconduct. It is not sufficient to argue that the judgment as reduced is not excessive. It is not possible to know what the verdict would have been in the absence of misconduct. (See *Garden Grove School Dist. v. Hendler,* 63 Cal. 2d 141, 143-144). If the only result of misconduct by a plaintiff's counsel is to be a reduction of damages to the amount which the judge deems justified by the evidence, the same result which follows any verdict regarded as beyond reason by the judge, counsel will be the more disposed to engage in improper behavior. Besides, despite the fact that, as we have said, plaintiff had a good case, it cannot be said that the misconduct had no effect on the issue of liability, and in particular on the issue of contributory negligence.

The incidents of misconduct may be grouped into a few classes. The first class includes unjustified imputations of unfairness of defendant, of opposing counsel, and of witnesses. We recognize fully the right of counsel to make vigorous argument, to challenge the veracity of witnesses, and to impugn their motives so far as these matters are within the record, including the reasonable inferences which may be drawn therefrom. The charges made by plaintiff's counsel go far beyond this. Counsel said of the defense: "This is the way they play the ball game. They don't know how to play it fair." To this there was assignment of misconduct and motion for mistrial. The court did not mention the misconduct, but denied the motion. Although this statement, stand-

ing alone, might be construed to refer to a single incident (defendant's calling of McLaughlin as its last witness rather than calling him earlier), other remarks by counsel show that throughout he was making a charge of unfairness against defendant and its counsel in a general way, not only in this but in other employees' cases. He referred to other cases in which the same counsel for Southern Pacific had been his adversary and said, "they don't hire any stumblebums; they are pretty good; it's their job, and *their job is to confuse* and do what they're supposed to do—is to help the Southern Pacific. But keep that in mind. That is his job. But don't let him get that smoke too close to you, otherwise you can't see the forest for the trees." (Emphasis supplied.) Again, "it stacks up to just one big game for the Southern Pacific Company, and you folks have seen it; it is now in your hands, to make sure that they are not going to get away with what they set out to do within a few minutes after this accident happened; thousands for defense, pictures, claimsmen, big lawyers—but nothing for Mike Sabella, a trusted employee for 35 years, and they call that fair play; they call that the twentieth century."

Specific reference to unfairness of defendant and its counsel, completely unsupported by the record, was a charge that photographs of the freight car which were favorable to plaintiff were being concealed. Counsel told the jury, "You see, all the pictures that may show it to his advantage, you don't see them.... They are not here." An assignment of misconduct was made. At an earlier time counsel for plaintiff had demanded all of the pictures which the defense had. After defense counsel handed him a group of pictures and said these were all the pictures that the defense had, counsel for the plaintiff challenged the statement and when his adversary replied that "You have my assurance," counsel

for plaintiff said, "It doesn't mean much." The combination of this remark with the later argument to the jury constituted an unwarranted impugnment of the honesty of the defense and of its counsel.

Reflections on the integrity of opposing counsel are highly improper. (*Love v. Wolf,* 226 Cal. App. 2d 378, 391). An unsupported accusation that defendant and its counsel suppressed evidence is misconduct which may produce reversal on appeal. (*Keena v. United Railroads,* 197 Cal. 148, 158-160; *Weaver v. Shell Co.,* 13 Cal. App. 2d 643, 648-650). Counsel for respondent made a charge which, if believed by the jurors, could not but have weakened their regard for opposing counsel and have led them to suspect generally the practices of appellant.

Counsel's attack also was upon defense witnesses, with the imputation that they were compelled to falsify. About the witness Medina, he said, "how long do you think he would be out there if he didn't sign [the statement]"; and, "you can look at the sorrowful look in a man's eyes when you are taking his deposition, and they cry out to you, 'I would like to help you, Mr. Teerlink, but I can't; I've got to send him down the tubes; it is him or me,' and that is the way you see it." Assignment of misconduct and motion for mistrial were made. The motion was denied. Again, counsel said, "What would happen to poor Medina if he didn't go along with it? Ever think about that? When they see how they threw him on the human trash pile, how quick would they give it to Medina if he didn't go along." Citation of misconduct was made. About McLaughlin, the supervisor, this remark was made, "He's come a long way. I wonder how many people he's stepped on to get there." The reference to the frightened witnesses at the depositions was particularly objectionable. It was completely outside the record, and was

therefore improper. (*Malkasian v. Irwin,* 61 Cal. 2d 738, 747). Its purport was to show that the railroad company causes its employees to testify falsely out of fear for their jobs, not only in this case, but generally.

The second class of incidents comprises those relating to the failure of the railroad to provide Sabella with a job within the restrictions imposed by the physicians. Appellant points out, correctly, that the company was not obliged to provide a substitute job. But because the company chose to offer evidence that a job would be available, the subject became an issue and there was room for legitimate argument on it. But counsel's remarks went beyond the scope of fair advocacy. He resorted to such reckless hyperbole as: "This isn't really 1964 at all. This goes back to the early stages of man's inhumanity to man long before they were savages, because I submit, and I will discuss with you folks this afternoon, never in the history of man could anyone have been taken down the tubes or down the drain like one Mike Sabella was." Reference to "inhumanity" of a defendant for the purpose of arousing anger or engaging the sympathy of the jury is wholly improper (*Jonte v. Key System,* 89 Cal. App. 2d 654; *Horn v. Atchison, Topeka & Santa Fe Ry. Co.,* 61 Cal. 2d 602, 609; *Love v. Wolf,* 226 Cal. App. 2d 378, 385). Citation of misconduct and motion for mistrial were made. Again, plaintiff's counsel said, "Hey, Mr. Southern Pacific, don't throw—don't dump him on the same trash pile where you dump those steel cars. This is a human being you are talking about now." Citation of misconduct was mad . The real point was what compensation should be made for plaintiff's diminished earning capacity, not what could be exacted from defendant by way of penalty. Similar argument, that the railroad had kicked plaintiff out like a "sawdust bag," was condemned in *Robinson v. Pennsylvania R. R. Co.,* 214 F. 2d 798, 801.

The last class of incidents contains other statements which are an inducement to the jury to award punitive damages. There is reference to plaintiff's poor financial condition, together with the suggestion that appellant was responsible for it: "You don't ever get a silver spoon in your mouth if you spend 36 years with the Southern Pacific." There was the "exchange of places" argument, although it was obscurely stated, "there isn't a soul would would spend [sic] any sum of money to be placed where Mike Sabella is." This is improper. (*Horn v. Atchison, Topeka & Santa Fe Ry. Co., supra,* p. 609). Further, "their whole defense is the hope that they might smear a little on Mike, and you might cut him by 10 or 15 or 20 percent, and they walk home and put it in their pockets." The concluding words of counsel's closing argument were: "You tell the Southern Pacific in that verdict it is high time to quit treating their employees that way."

Respondent points out that counsel for the defense did not request admonitions to the jury. This is true and it cannot be doubted that the practice of making such requests is to be commended and in some cases may be essential. (See California Trial Objections (Cont. Ed. Bar) §§ 31.10-31.16, pp. 190-193). The request for admonition presents the court with a clear-cut motion upon which it must rule; it calls for less drastic remedy than mistrial, which the court ordinarily wishes to avoid because of the waste of time and money and because of the sense of frustration imposed upon the jurors; it gives opportunity for prompt and effective correction. When motion for mistrial is denied, motion for admonition usually ought to follow. But in the case at hand there were three motions for mistrial and nine citations of misconduct. We are not disposed to say that conforming with a precise ritual is always necessary in protesting a series of offenses.

(See *Love v. Wolf*, 226 Cal. App. 2d 378, 392). Nor do we try to calculate exactly how much harm was done by the misconduct. (*Love v. Wolf, supra*, p. 394.)

The case resembles that of *Horn v. Atchison, Topeka, & Santa Fe Ry. Co.*, 61 Cal. 2d 602, in the general nature of the misconduct. Trial of the Sabella case commenced about five months after the stern condemnation of the misconduct in the *Horn* opinion, and about nine months after that in *Love v. Wolf*. But in the *Horn* case no objection at all was made during the arguments; wherefore waiver resulted from silence.

Respondent also points out that defense counsel, in making his protests, sometimes (particularly in the "trash pile" parts of the argument) called the court's attention to the evidence which it would have produced about plaintiff's retirement. We do not regard this fact as so far diluting the assignments of misconduct and motions for mistrial as to make them unavailable for the correction of the error caused by the inflamatory and accusatory arguments of plaintiff's counsel. Complete reversal, rather than reversal on the issue of damages only, must be made. The improper references to suppression of evidence related to the issues of liability and of contributory negligence.

The judgment is reversed.

Devine, P. J.

We concurr:
Rattigan, J.
Christian, J.
Filed, May 28, 1968,
Lawrence R. Elkington, Clerk.

Appendix C

In the Supreme Court of the State of California
In Bank

S. F. 22614

[70 AC 323, 449 P 2d 750, 74 Cal Rptr 534]

Filed Feb. 7, 1969.
William I. Sullivan, Clerk.

Mike Sabella,
Plaintiff and Respondent,
v.
Southern Pacific Company,
Defendant and Appellant.

Defendant appeals from a judgment in favor of plaintiff under the Federal Employers' Liability Act. The jury brought in a verdict of $115,500, but by remittitur to which plaintiff consented the award was reduced to $80,000. Defendant cites as error the trial court's refusal to admit evidence of a disability pension, and purported misconduct by plaintiff's counsel. We conclude that the judgment must be affirmed.

Plaintiff Mike Sabella was injured while working as a "carman cutter" for defendant railroad. Among other duties, it was his task to cut damaged freight cars into scrap. While doing so, plaintiff fell from the roof of a car he was cutting and sustained severe back injuries. He alleged that his fall was caused by the negligence of defendant's crane operator in moving the roof section, which had been attached to the

crane preparatory to lifting the section off, while plaintiff was still walking on it; and by the failure of defendant to provide a reasonably safe place in which to work. The defense was based on a denial of negligence and an allegation of contributory negligence, which may reduce an F.E.L.A. award.

At the conclusion of the trial, and following the verdict in favor of plaintiff, defendant moved for a new trial on multiple grounds: (1) insufficiency of the evidence; (2) excessive damages; (3) disregard by the jury of the court's instructions as to contributory negligence; (4) error in law in excluding evidence of a disability pension received by plaintiff; and (5) misconduct by plaintiff's counsel. The court made an order finding "That the evidence is insufficient to sustain the verdict of the jury; and [that there] was error in law, occurring at the trial and excepted to by defendant, and that such error was prejudicial . . . ."[1] A new trial was denied, however, on the condition that plaintiff consent to a reduction of the verdict from $115,500 to $80,000. Plaintiff agreed and does not now challenge the propriety of the reduction.

The parties are in accord that the only "error in law" asserted by the defendant, and that undoubtedly referred to by the court, was the exclusion of evidence of plaintiff's disability pension. Arguments as to the propriety of the remittitur in this case cannot, therefore, be premised on an assumption that the trial court also found prejudicial misconduct by plaintiff's attorney. By necessary implication, the allegation of misconduct was rejected by the trial court,

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1. This case was tried prior to the passage of Code of Civil Procedure section 657, which now requires a judge to specify his reasons for granting a whole or partial new trial. (See *Mercer v. Perez* (1968) 68 A.C. 102.)

and the remittitur was intended solely to rectify the exclusion of the evidence of the pension. We turn, then, to an examination of this alleged error in law and the effect of a remittitur on such error.

During the course of the trial, counsel for plaintiff proposed to read questions and answers concerning plaintiff's condition from a form which had been filled in by Dr. Calvin of the Southern Pacific Hospital. The questions read were as follows: "May applicant's condition be expected to improve?" followed by a check mark against "No"; "Applicant able to work in last occupation?" followed by checks against "At present—No"; "May applicant be able to work in last occupation in the future?" followed by a check against "No"; "Type of work: Limitation to 25 pounds weight lifting, and no climbing or working on moving railroad equipment."

Defendant sought to read into evidence other parts of this form and an accompanying letter, which would have revealed that the subject of the form was plaintiff's application to the Railroad Retirement Board for a disability pension. The purpose of such evidence, asserted defendant, would be (1) to show that the report was really based on a subjective evaluation, influenced by the opinion of the doctor that since plaintiff was applying for a disability pension, he probably could not be expected to improve because he did not want or have to go back to work; (2) to explain and identify the whole of the document of which plaintiff read only a part (citing Code of Civil Procedure section 1854, now Evidence Code section 356); and (3) to counter allegations that defendant had refused plaintiff a job and had generally turned its back on him following his injury.

Plaintiff objected on the ground that *Eichel v. New York Central R. Co.* (1963) 375 U.S. 253, makes such evidence inadmissible. In *Eichel,* also an F.E.L.A. case, evidence was

offered of receipt by the petitioner of a Railroad Retirement Act pension, in order to impeach his testimony as to motive for not returning to work and as to the permanence of his injury. The court held that "it would violate the spirit of the federal statutes" to admit evidence of such a pension. It reasoned that Railroad Retirement Act benefits may not be considered in mitigation of damages, and there will generally be other evidence of malingering with greater probative value and less likelihood of misuse by the jury. This balance of probative value against prejudicial effect is also the law of this state, now embodied in Evidence Code section 352.

Defendant distinguishes *Eichel* on the ground that here plaintiff had "opened the door" to such evidence by himself introducing a portion of the form in question. Defendant analogizes to the cases admitting evidence of insurance coverage where the opposing party has broached the subject or made such evidence necessary to explain or refute counterevidence (see, e.g., *Hatfield v. Levy Bros.* (1941) 18 Cal. 2d 798), and further contends that *Eichel* had been interpreted in such a manner (*Gladden v. P. Henderson & Co.* (3rd Cir. 1967) 385 F. 2d 480, cert. den. 390 U.S. 1013).

We find it unnecessary to resolve this close question of prejudice and probative value. Upon motion for a new trial, the court obviously decided it should have admitted the evidence in question and proceeded to order the remittitur. In short, the court deemed that all the evidence, *including* that which it rejected but later determined should have been admitted, was insufficient to support the amount of the award. This in no way suggests that the court considered the evidence insufficient to support *any* award. (*Muench v. Gerske* (1934) 139 Cal. App. 438, 443-444.) Under the circumstances, the remittitur was proper.

Defendant, however, insists that only insufficiency of the evidence can justify a remittitur, and that a prejudicial error in law due to exclusion of relevant evidence, having deprived defendant of a full hearing by the jury on all the evidence, necessarily requires a complete new trial. No authority compels such rule and we find the contention untenable. For example, it has never been held that if evidence of certain medical expenses, relating only to the issue of damages, were wrongfully excluded the court would be forced to order a new trial on all issues. Patently this is impractical and contrary to the purposes of the remittitur procedure. If, as the trial court impliedly found here, the only defect relates to the measure of damages, and if the appropriate amount can be ascertained from the evidence, remittitur is the proper remedy to cure that defect and avoid the necessity of a new trial.[2]

The record supports the conclusion that the error in law here alleged was limited in effect to the question of damages. The issue of liability in this case concerned only the manner in which plaintiff cut the freight car, the actions of the crane operator, and the safety of the working conditions provided by defendant. Clearly the question whether plaintiff in fact had a permanent injury or was simply malingering, the accuracy and manner of the doctors' diagnoses, and the availability of future work for plaintiff relate to none of the above factors of liability, but only to the assessment of damages. There is no allegation that the damages as now reduced are

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2. For purposes of this case we may assume that, as defendant contends, excessive damages resulting from passion or prejudice which might also affect the issue of liability cannot be cured by a remittitur. (See *Minneapolis, St. Paul etc. Ry. Co. v. Moquin* (1931) 283 U.S. 520; but cf. *Deevy v. Tassi* (1942) 21 Cal. 2d 109, 120-121.) However, the court's remittitur does not imply a finding of passion or prejudice. (*Hughes v. Hearst Publications, Inc.* (1947) 79 Cal. App. 2d 703, 705.)

excessive. Consequently both the application and the result of the remittitur in this case were proper, and any error in law that might have occurred was thereby cured.

But, defendant asserts, the excluded evidence might also have helped to counter plaintiff's charges—which defendant assigns as misconduct—that defendant unfairly turned its back on him after the accident, and might thus have reduced any passion or prejudice inherent therein. Assuming *arguendo* that the statements in question were both improper and prejudicial, a matter to be discussed below, the remedy was not the insertion of additional prejudicial evidence, attempting in effect to counter error with error. The antidote was a timely objection and request for admonition of the jury, to remove the effect of the wrongful statements. Even more clearly than in *Eichel,* defendant had this less prejudicial means of making its point; as will be seen, it failed to utilize this means and cannot now complain of an inability to mitigate any prejudice that resulted.[3]

We turn now to defendant's second major contention, i.e., that plaintiff's counsel was guilty of prejudicial misconduct. The alleged misconduct consisted, among other things, of repeated references, both direct and indirect, to defendant as "inhuman" and heartless, sending plaintiff "down the tubes" and casting him on the "human trash pile"; as "cheapskates" attempting to put up a "smokescreen" by perjury

3. Despite the court's exclusion of all evidence of the pension, on those occasions when defendant did object to plaintiff's charges of unfairness defendant attempted to inject this evidence by indirect reference. When plaintiff's counsel made statements referring to defendant's ill treatment of plaintiff, defendant objected and each time alluded to "the offer of proof I made in chambers as to what this man's actual situation was and the election he made," or to "what was done for this man," or employed similar statements. This was improper, especially when used in lieu of a request for an admonition of the jury. (See *Boyd v. Theetgee* (1947) 78 Cal. App. 2d 346.) But even if defendant's misconduct could somehow cancel out that of his adversary, plaintiff, like his opponent, failed to object to the remarks in order to preserve the issue for appeal.

and deceit so as to deprive plaintiff of his just due and put the money instead into defendant's "coffers." Reference was also made to the disparity in wealth between plaintiff and defendant, combined with an appeal to the jurors' personal sympathies.[4] It is unnecessary to detail any further the precise language used or to make a phrase-by-phrase comparison between this and other exemplars of misconduct since it is only the record as a whole, and not specific phrases out of context, that can reveal the nature and effect of such tactics. Upon review of the entire record we conclude that plaintiff's counsel was guilty of deplorable misconduct which might well have been prejudicial. However, in view of defendant's failure to take proper steps to preserve the latter issue of prejudice on appeal, we find it unnecessary to reach it on the merits.[5]

Assuming counsel's conduct was both improper and prejudicial, and further assuming for purposes of discussion that such misconduct went to the issue of liability and so could not be cured by remittitur (see fn. 2, *ante*), we examine the record before us in light of the applicable legal principles.

"Generally a claim of misconduct is entitled to no consideration on appeal unless the record shows a timely and proper objection and a request that the jury be admonished." (*Horn v. Atchison, T. & S.F. Ry. Co.* (1964) 61 Cal. 2d 602,

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4. In recent years a number of personal injury lawyers have written books suggesting a variety of somewhat deceptive means of eliciting sympathy for litigants appearing before a jury. (See *Prosser*, 43 Cal. L. Rev. 556 (1955), reviewing Belli, Modern Trials (1954); R. M. Mosk, 16 U.C.L.A. L. Rev. 216 (1969), reviewing Appleman, Preparation and Trial (1967).) Such tactics are not part of the repertoire of the ethical professional man.

5. In any event, the trial court impliedly found no misconduct, or at least no prejudice, when ruling on the motion for new trial. "A trial judge is in a better position than an appellate court to determine whether a verdict resulted wholly, or in part, from the asserted misconduct of counsel and his conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong." (*Cope v. Davidson* (1947) 30 Cal. 2d 193, 203.)

610.) "As the effect of misconduct can ordinarily be removed by an instruction to the jury to disregard it, it is generally essential, in order that such act be reviewed on appeal, that it shall first be called to the attention of the trial court at the time, to give the court an opportunity to so act in the premises, if possible, as to correct the error and avoid a mistrial. Where the action of the court is not thus invoked, the alleged misconduct will not be considered on appeal, if an admonition to the jury would have removed the effect." (*Cope v. Davison* (1940) *supra,* 30 Cal. 2d at 202.) "'It is only in extreme cases that the court, when acting promptly and speaking clearly and directly on the subject, cannot, by instructing the jury to disregard such matters, correct the impropriety of the act of counsel and remove any effect his conduct or remarks would otherwise have." (*Tingley v. Times-Mirror,* 151 Cal. 1, 23 [89 P. 1097].) . . . [W]e are aware of no California case wherein a plaintiff's verdict was reversed for misconduct during his counsel's argument in the lack of timely objections and a request that the jury be admonished where such admonition could be effective." (*Horn v. Atchison, T. & S.F. Ry. Co.* (1964) *supra,* 61 Cal. 2d at pp. 610-611.)

This case is neither precisely like *Horn,* supra, in which no objection or request for admonition was made until after conclusion of the closing argument (and relief was thus denied); nor like *Hoffman v. Brandt* (1966) 65 Cal.2d 549, in which an admonition, especially as there given by the trial court, could not have been effective under the circumstances; nor like *Love v. Wolf* (1964) 226 Cal. App. 2d 378, in which admonition of the jury was requested several times but disregarded by the trial court. Here defendant remained silent as to all but one line of argument, and as to the latter he objected but failed at any time to request an admonition of

the jury to disregard the remarks. Under the circumstances we conclude that defendant must be denied relief. (See *Estate of Hart* (1951) 107 Cal. App. 2d 60, 70.)

The record indicates that while plaintiff's counsel accused witnesses of perjury, made reference to defendant's wealth and plaintiff's lack of resources, and appealed, though indirectly, to the jurors to place themselves in plaintiff's position, all of which tactics are improper and to be condemned (see, e.g., *Hoffman v. Brandt* (1966) *supra,* 65 cal. 2d 549; *Horn v. Atchison, T. & S.F. Ry Co.* (1964) *supra,* 61 cal. 2d 602; *Love v. Wolf* (1964) *supra,* 226 Cal. App. 2d 378), defendant did not once object to such remarks, much less request an admonition to the jury. "In the absence of a timely objection the offended party is deemed to have waived the claim of error through his participation in the atmosphere which produced the claim of prejudice." (*Horn v. Atchison, T. & S.F. Ry. Co.* (1964) *supra,* 61 Cal. 2d at p. 610.)

Defendant did object, however, to one distinct line of argument by his adversary. As discussed earlier, defendant challenged references to turning its back on plaintiff and refusing to help him or to give him a job and generally being out to defeat his claim. This was, in fact, perhaps the mildest and least prejudicial of the alleged instances of misconduct. Although counsel used improper language, the question of defendant's treatment of plaintiff appears to have been put in issue, at least in part, by defendant when it asserted during opening statement that there was work plaintiff could do on the railroad. However, even assuming that the entire line of argument was misconduct, defendant remained silent when during opening argument plaintiff's counsel at least twice alluded to defendant's denial of a job and of hospitalization to plaintiff, and when during the trial he used such terms as "cheapskates" in referring to defendant. It was not

until closing argument, after defendant had attempted to counter the "unfairness" argument with evidence of plaintiff's disability pension (see fn. 3 supra), rather than by means of the long estiblished procedure of admonishing the jury,[6] that defendant finally objected, but even at that tardy point counsel did not request an admonition. Certainly as to this particular line of argument an admonition would have been effective, especially if requested at the outset. One of the primary purposes of admonition at the beginning of an improper course of argument is to avoid repetition of the remarks and thus obviate the necessity of a new trial. (*Horn v. Atchison, T. & S.F. Ry Co.* (1964) *supra,* 61 Cal. 2d at p. 610.) Except perhaps in cases of highly emotional or inflammatory language or reference to extremely prejudicial circumstances not in evidence, a jury must be deemed capable, if so instructed, of ignoring references to a litigant's personal or corporate virtues and confining itself to the merits of the case. (Compare *Deevy v. Tassi* (1942) *supra,* 21 Cal. 2d 109, 123, with *People v. Kirkes* (1952) 39 Cal. 2d 719, 726.)[7]

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6. Defendant asserts that it did not know at the outset how heavily this line of argument would be emphasized, although during one objection defendant claimed that it had been "anticipating" such an argument and meant to counter it by evidence of the disability pension. Obviously, the fact that this counterevidence was subsequently excluded cannot alone excuse the failure to object if in fact the argument was improper. It was not the exclusion of the pension evidence that determined the propriety of the language and allusions employed by plaintiff's counsel.

7. Defendant was apparently not unaware of the tactical availability and desirability of an admonition to the jury. When plaintiff attempted to argue damages on a "per diem" basis, defendant objected strenuously and asked for and received an admonition that the jury disregard this line of argument. (As to the propriety of that ruling, see Beagle v. Vasold (1966) 65 Cal. 2d 166.) It is significant that far more questionable statements made at the same time, which defendant now cites as misconduct, were not alluded to in the "per diem" objection.

Defendant urges us to ignore the rules of procedure relating to the "magic words" of proper objection and admonition. But the procedure outlined above is not a meaningless ritual; it has been designed through judicial experience to prevent by timely words of caution the very problem with which we are here concerned.

We emphasize again that the particular language used by counsel and the form or lack of objection by defendant in this case are not meant to serve as invariable guidelines for future reference. Each case must ultimately rest upon a court's view of the overall record, taking into account such factors, inter alia, as the nature and seriousness of the remarks and misconduct, the general atmosphere, including the judge's control,[8] of the trial, the likelihood of prejudicing the jury, and the efficacy of objection or admonition under all the circumstances.

Our conclusions should in no way be interpreted as condoning the deplorable conduct of plaintiff's counsel.[9] However, punishment of counsel to the detriment of his client is not the function of the court. (See *Shaff v. Baldwin* (1951) 107 Cal. App. 2d 81, 87.) Intemperate and unprofessional conduct by counsel as is here involved runs a grave and unjustifiable risk of sacrificing an otherwise sound case for recovery, and as such is a disservice to a litigant. These same

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8. While it cannot be said that the trial court here "lost control" of the proceedings (cf. *Love v. Wolf* (1964) *supra*, 226 Cal. App. 2d 378, 391), a court should on its own initiative intercede to prevent potentially prejudicial conduct of counsel. Such action here, directed either at counsel or to the jury, not only might have mitigated the prejudice here alleged, but it would have enhanced the dignity and demeanor of the proceedings.

9. Counsel's law firm has been the subject of judicial condemnation in at least two other recent instances of comparable misconduct. (*Horn v. Atchison, T. & S.F. Ry. Co.*, *supra*, 61 Cal 2d 602; *Love v. Wolf*, *supra*, 226 Cal. App. 2d 378.)

tactics, in another context, would likely result in a reversal. However, under the facts and circumstances of this case, we conclude that the award to plaintiff, as modified by the remittitur, is justified.

The judgment is affirmed.

Mosk, J.

We concur:

McComb, J.
Peters, J.
Tobriner, J.
Burke, J.
Sullivan, J.

DISSENTING OPINION BY TRAYNOR, C. J.

I dissent.

I would reverse the judgment on the ground that the misconduct of counsel for plaintiff deprived defendant of its right to a fair trial.

In his opening statement, counsel for plaintiff made a preliminary appeal to the sympathy of the jury by stressing that plaintiff had left school after the seventh grade to go to work and had worked for defendant for 36 years. Thereafter in the course of the trial, counsel deliberately sought to implant prejudice in the jury against defendant. He insinuated, without offering any evidence to prove it, that defense counsel had withheld photographs favorable to plaintiff. He referred to defendant and its attorneys as "cheapskates." He asked rhetorical questions calculated to convey the impression that defense witnesses were not honest in their testimony. Nor was that all. After several days of trial, when a trial court is normally reluctant to grant a mistrial, he used his closing argument to intensify his appeal to the passion and prejudice of the jury. The appeal was the more

insidious because it followed upon a fulsome declaration of his great trust in the jury system. His trust was such that he urged a verdict on issues extraneous to the merits. Approximately a third of his argument consisted of emotional attacks on defendant, its counsel, and its witnesses for defendant. He called upon the jury to "tell the Southern Pacific in that verdict it is high time to quit treating their employees that way."

There is no question that his conduct was on its face prejudicial. The question to be resolved is whether or not defendant waived its right to complain even though it repeatedly made objections at the trial.[1] The objections were more than enough to alert the trial court. The court itself sought to call

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1. Counsel for defendant objected ten times during the closing argument for plaintiff. The appeals to prejudice and the corresponding objections are tallied below:

First: "Now, ladies and gentlemen, I know that before you folks sat here, that you came here on January 25th, 1964, and I know in your hearts, as in my heart, after you saw the presentation of this case, that I'll bet you are amazed and stunned beyond belief. This isn't really 1964 at all. This goes back to the early stages of man's inhumanity to man long before they were savages, because I submit, and I will discuss with you folks this afternoon, never in the history of man could anyone have been taken down the tubes or down the drain like one Mike Sabella was.

"And I say to you, ladies and gentlemen, that the conduct of his employer, the Southern Pacific Company in this case, is about as reprehensible in 1956 [sic]—

"Mr. Phelps [counsel for defendant]: Your Honor, I am going to object to this line of argument and assign it as misconduct, particularly in view of Your Honor's ruling that is keeping out of evidence the matter that I wanted to introduce, the matter that I—the argument is along the lines I was anticipating and I could have met and did want to meet by evidence, and I will object and cite it as misconduct and ask for a mistrial.

"The Court: Well, the motion for a mistrial will be denied; and I suggest, Mr. Teerlink, that you confine yourself to the evidence and such reasonable implications as you may draw therefrom.

"Mr. Teerlink: Yes, Your Honor."

Second: "Did they even agree to pick up $11.50 a month to see that the poor guy got his hospitalization? No."

"Mr. Phelps: If Your Honor please, I am going to object in view of the offer of proof I made in chambers as to what this man's actual

a halt to the objectionable conduct by admonishing counsel for plaintiff to "confine yourself to the evidence and such reasonable implications as you may draw therefrom." When

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situation was and the election he made, and I think it is misconduct to encroach in the manner that has been done.

"Mr. Teerlink: The stipulation, as I understand, Your Honor, was that the railroad company tendered the right to pick up his hospital benefits, and they declined; that was the stipulation that you entered.

"Mr. Phelps: I understand that, but you are arguing something that prevents me from answering.

"The Court: Let's not go beyond the stipulation."

Third: "They cut off—no more hospital benefits, no more outpatient, by the time of December—

"Mr. Phelps: I make the same objection, Your Honor please, in view of the situation, my hands having been tied—

"Mr. Teerlink: I say there are no benefits payable after December. That is the evidence.

"Mr. Phelps: 'What did the Southern Pacific Company do when you'—

"The Court: Let's—

"Mr. Phelps: —I object to that and assign it as misconduct.

"Mr. Teerlink: That is the evidence, Your Honor. He had no benefits after December.

"The Court: I know, but you are going beyond that.

"Mr. Phelps: You foreclosed me.

"The Court: Let's stay within the confines."

Fourth: "Do you think that was strategy? This is the way they play the ball game. They don't know how to play it fair. The last witness, ladies and gentlemen, is, low and behold, McLaughlin—

"Mr. Phelps: I object and assign that as misconduct: 'They don't know how to play it fair.' There is a case that this very firm has been reversed for, argument of a similar nature, and I assign it as misconduct and ask for a mistrial.

"The Court: Motion denied."

Fifth: "They employ 45,000 people, and they couldn't make room for him to do anything—maybe even delivering the messages down at 65 Market Street; you mean to tell me, ladies and gentlemen, if you have got the good will of your employee at stake that you won't at least call him up and say—

"Mr. Phelps: I am going to object to this on the same ground and cite it as misconduct. Your Honor knows what the situation is. Your Honor knows what I was foreclosed from, and I think that this is improper argument.

"The Court: Just a moment.

"Mr. Phelps: Your Honor knows what the situation was.

"The Court: Let's keep it within the confines of the evedince."

Sixth: "Now, ladies and gentlemen, isn't it interesting to you, when they've got all these pictures, where is that claims man with

counsel for plaintiff nevertheless made fresh appeals to the passion and prejudice of the jury, and defense counsel continued to object, the court once again admonished counsel

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the rest of the pictures they didn't show? He has been around here for two weeks, and we haven't seen or heard from him.

"Mr. Phelps: Just a moment. He is implying—You told me you didn't want him this morning.

"Mr. Teerlink: Only—

"Mr. Phelps: You told me you didn't want him. I had him here at your request.

"Mr. Teerlink: Sit down and let me finish my argument.

"The Court: All right, gentlemen; we have a time limit. Please."

Seventh: "Does it seem ironical to you, ladies and gentlemen, that they can take aerial photographs—

"Mr. Phelps: I—

"Mr. Teerlink: Will you keep out of my argument. —that they can take aerial photographs within a few hours or less than that? Imagine getting an airplane and camera equipment and start shooting photographs to defeat a claim—and rulers, when all they would have had to do—"

(The photographs were not taken from an airplane.)

Eighth: "Mike Sabella was lying on his back with a busted back thinking maybe they were going to do something decent for him, maybe once in a life the friendly Southern Pacific could be friendly. No, sir. All we get is a second best, a lousy evidence that they decide to bring in.

"You see, all the pictures that may show it to his advantage, you don't see them.

"Mr. Phelps: Now—

"Mr. Teerlink: They are not here.

"Mr. Phelps: I will object to that and assign it as misconduct. This is, again, characteristic of the defense, and without any evidence, without justification, and the type of thing that the Courts have said is not proper, and I object to it.

"The Court: Go ahead."

Ninth: "Now, what about poor Mr. Medina [a witness for defendant]? What do you think poor Mr. Medina must think when he sees and he knows what they are doing to Mike? What would happen to poor Medina if he didn't go along with it? Ever think about that?

"When they see how they throw him on the human trash pile, how quick would they give it to Medina if he didn't go along—

"Mr. Phelps: I object again and cite this as misconduct in view of the fact I was foreclosed from proving that isn't the fact as to what we did or what was done for this man, and I cannot stand still and listen to this, knowing what the facts are."

Tenth: "[Y]ou can look at the sorrowful look in a man's eyes when you are taking his deposition, and they cry out to you, 'I would

for plaintiff to "stay within the confines." When counsel for plaintiff persisted in his misconduct, in the face not only of defendant's objections and motions for mistrial but also of the admonitions of the court, he evinced a studied determination to ride roughshod over any and all objections or admonitions.

Though he threw one caution after another to the wind, he now contends that defendant waived objection to any misconduct by not supplementing his repeated objections with a request that the trial court admonish the jury to disregard the misconduct.[2] No admonition, however, could cure the prejudicial effect of such misconduct as prevailed throughout this case. Accordingly, defendant's failure to request admonitions to the jury does not preclude it from challenging the misconduct on appeal. (*Hoffman v. Brandt* (1966) 65 Cal. 2d 549, 553; *Horn v. Atchison, T. & S.F. Ry. Co.* (1964) 61 Cal. 2d. 602, 611; *Love v. Wolf* (1964) 266 Cal. App. 2d 378, 392.) Plaintiff's counsel can hardly claim that his repeated appeals to passion and prejudice were of such

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like to help you, Mr. Teerlink, but I can't; I've got to send him down the tubes; it is him or me,' and that is the way you see it.

"Mr. Phelps: If Your Honor please, 'down the tubes,'' when this man is down—the situation is such, Your Honor please, I am foreclosed from saying it—

"Mr. Teerlink: You've said that about 14 times.

"Mr. Phelps: The ruling—

"Mr. Teerlink: You haven't given him a job; that is for sure.

"Mr. Phelps: That is just—Now, there we go again.

"If Your Honor please, instruct Mr. Teerling to desist from that. I assign it again as misconduct and move for a mistrial in view of the offers that I made of proof.

"The Court: Denied. Proceed."

2. It is at least debatable that implicit in any objection to misconduct is a request that the jury be admonished to disregard it. Thus, in *Hoffman v. Brandt,* (1966) 65 Cal. 2d 549, 553, counsel objected but did not request an admonition. The trial court, however, admonished the jury on its own motion. We nevertheless held that the admonition did not cure the error.

little appeal that they could have been simply erased by admonitions.

Counsel for paintiff offers a brace of alternative contentions, namely, that there was no misconduct but only colorful argument, and that in the event of any error, it was cured by the trial court's remittitur. These contentions cannot be sustained. It is misconduct to compare the wealth of plaintiff and defendant (*Hoffman v. Brandt, supra,* 65 Cal. 2d 549, 553; *Love v. Wolf, supra,* 226 Cal. App. 2d 378, 388-389); counsel for plaintiff did so.[3] It is misconduct to accuse defendant and defendant's counsel of suborning perjury (*Love v. Wolf, supra,* 226 Cal. App. 2d 378, 391); counsel for plaintiff did so.[4] It is misconduct to accuse defense counsel of withholding evidence (*Keena v. United Railroads* (1925) 197 Cal. 148, 158-160); counsel for paintiff did so.[5] It is misconduct to suggest to the jurors that they measure damages by what they would take to endure plaintiff's suffering (*Horn v. Atchison, T. & S.F. Ry. Co., supra,* 61 Cal. 2d 602, 609; *Zibbell v. Southern Pac. Co.* (1911) 160 Cal. 237, 255); counsel for plaintiff did so.[6] It is misconduct to suggest facts not in evidence that counsel knows could be contradicted by

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3. Referring to plaintiff, counsel said: "You saw what they did to him. You saw the thanks he got. He got just exactly what they give to any poor guy with a seventh grade education: he got nothing."

About defendant, he said: "They employ 45,000 people, and they wouldn't even make room for him to do anything—maybe even delivering the messages down at 65 Market Street."

4. See note 1, supra, Ninth.

5. See note 1, supra, Fourth, Sixth, and Eighth.

6. "And as to that 6,570 days of misery he has got left, there isn't a soul in this world that would put up with what Mike Sabella is going to have to put up with, the hopelessness of it all, for a measly figure we have got down there."

evidence that the court had excluded. (*Hoffman v. Brandt, supra,* 65 Cal. 2d 549, 554); counsel for plaintiff did so.[7]

The courtroom is a forum for the presentation of evidence and rational argument, not a stage for over mellow drama. The responsibility of a lawyer is to raise issues, not scenes, and to reason about them in nontheatrical terms. Invective, with all its theatrics, has no place in language of the law.

When appeals to passion and prejudice may have influenced a verdict, they may have influenced it on the issue of liability as well as on the issue of damages. Hence, in such a case remittitur cannot cure the error. (*Minneapolis, etc. Ry. v. Moquin* (1931) 283 U.S. 520; *Sanquinetto v. Moore Dry Dock Co.* (1951) 36 Cal. 2d 812, 820.) There is no cure but reversal for an error that impairs the right to a fair trial. The right to a fair trial includes the right to an impartial trier of fact and the correlative right to a trial free of appeals to passion and prejudice.

We take great care to excuse prospective jurors who may be subject to emotional appeals. We take great care to instruct jurors not to discuss the case with outsiders or to read about it, so that they will remain beyond the reach of influence outside the courtroom. It is a minimum propriety to guard against calculated attempts to prejudice the jury inside the courtroom, for they do violence to the substantial rights of a litigant. Still worse, they would in the long run so debase the judicial process that no one could enter a courtroom confident of a fair trial.

Traynor, C. J.

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7. See note 1, supra; First, Second, Third, Fifth, Ninth and Tenth.

The line of argument that defendant refused to give plaintiff a job is contradicted by the fact that plaintiff did not attempt to return to work but applied for a pension instead. We may assume, without deciding, that evidence of the pension was inadmissible. (*Eichel v. New York Central R. Co.* (1963) 375 U.S. 253.)

In the
Supreme Courtof the State of California
S. F. No. 22614
Appeal

APPEAL

City and County of San Francisco
Supreme Court of the State of California

Mike Sabella,
Plaintiff and Respondent,
vs.
Southern Pacific Company,
Defendant and Appellant.

The above-entitled cause having been heretofore fully argued, and submitted, it is ordered, adjudged, and decreed by the Court that the judgment of the Superior Court, City and County of San Francisco in the above-entitled cause, is hereby affirmed. Respondent to recover costs on appeal.

I, William I. Sullivan, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing is a true copy of an original judgment entered in the above-entitled cause on the 7th day of February, 1969.

Witness my hand and the seal of the Court, this 10th day of March, 1969.

[Seal]

WILLIAM I. SULLIVAN, Clerk
By: KEITH HAWKES, Deputy

Appendix D

Plaintiff's Arguments to Jury

OPENING ARGUMENT

(Emphasis by italics added)

(R 585-621)

By Mr. Teerlink [counsel for plaintiff]: Thank you.

If it please the Court, counsel, and ladies and gentlemen:

We have only a few minutes, ladies and gentlemen, but we have already discussed in chambers, and we know you folks are anxious to get this case and to decide the case. You have spent almost a week here now, and it will take probably the rest of the afternoon to present the arguments of counsel. We certainly hope and we are certainly going to do our best to see that they are completed this afternoon so that the Judge may instruct the first thing in the morning, and then you will get away on the case.

First of all, I would just like to make a couple of preliminary comments, if I may, ladies and gentlemen, and that is this:

I mean this sincerely, because as a trial lawyer, one who has chosen as his profession that job and obligation of representing litigants in jury trials, I have a deep conviction for the jury system, and if ever I have a deep conviction, I have it right after this case was presented here in the past four days, because I know that when you get twelve people of all walks of life who have no axe to grind one way or the other, who are just going to decide this case, then you are going to get a fair play and be able to see through the sham and the shadows that are sometimes in a lawsuit. I think we will discuss that a little bit later.

So, again, at this time, ladies and gentlemen, I sincerely thank you for your time and your efforts. I know all of you have been inconvenienced, and to many of you it has been a monetary loss. For the small pittance we are permitted to pay you under the law, it certainly doesn't compensate you. The only thing I can hope is that it has given you some new feeling and new insight into our American way of justice, because our jury system is a precious way; it is the foundation of our American way of life, as far as I am concerned. As long as we have folks like you who are willing to give your time and effort, for, you see, this type of system is promulgated and prolonged, and I think we are going to have the great country as we have had in the past.

Now, ladies and gentlemen, I know that before you folks sat here, that you came here on January 25th, 1964, and *I know in your hearts, as in my heart, after you saw the presentation of this case, that I'll bet you are amazed and stunned beyond belief. This isn't really 1964 at all. This goes back to the early stages of man's inhumanity to man long before they were savages,* because I submit, and I will discuss with you folks this afternoon, *never in the history of man could anyone have been taken down the tubes or down the drain like one Mike Sabella was.*

And I say to you, ladies and gentlemen, that *the conduct of his employer, the Southern Pacific Company, in this case, is about as reprehensible in 1954—*

Mr. Phelps [counsel for defendant]: Your Honor, I am going to *object to this line of argument and assign it as misconduct,* particularly in view of Your Honor's ruling that is keeping out of evidence the matter that I wanted to introduce, the matter that I—the argument is along the lines I was anticipating and I could have met and did want to meet by evidence, and *I will object and cite it as misconduct and ask for a mistrial.*

The Court: Well, *the motion for a mistrial will be denied;* and I suggest, Mr. Teerlink, that you confine yourself to the evidence and such reasonable implications as you may draw therefrom.

Mr. Teerlink: Yes, Your Honor.

You know, ladies and gentlemen, this is a law that the Court will give to you as to the theory upon which the plaintiff proceeded in this case, and the law is a just one. It says that a railroad has a continuing duty to provide the plaintiff with a reasonable and safe place to work. It has a further duty to provide him with adequate and fair and equitable—sufficient number of proper equipment to use in his job; they have the duty to supply him with proper equipment and tools to do his job properly. This is the law, and the law says that if the company fails to provide him with proper equipment and tools to perform their job, or if they fail to provide him with a reasonably safe place in which to work, or if a fellow employee himself was negligent, which brought about the plaintiff's injury, then he is entitled to recover; and for negligence on the part of the railroad or its employees, in any degree, no matter how slight, which contributed proximately to the plaintiff's injury, then he is entitled to your verdict in this case.

Now, on this particular case, ladies and gentlemen, the evidence is clear beyond any peradventure of a doubt because of the testimony of Mr. Medina, the crane operator himself, who came up here, and *you know why they brought him instead of reading his deposition: because in his deposition the truth will out.*

Maybe a clever man like McLaughlin can stand up here with a straight face and tell you things that you know are not true, and he knows they're not true, but the little working man may be scared of his job, but eventually if you question him and question him, it will come out.

And in this case here, when he was asked in his deposition how high was the top of those—of the two pieces of steel above the roof of that car, he said two feet, and he told you that that had to be raised, then they had to take those two pieces and they had to—in order to raise them, they had to raise them two feet in the air for them to swing in the car, because after they were all over, the crane showed that they were two feet above. That is the crane operator's own testimony.

And we know, ladies and gentlemen, that had he just taken the slack, and these things had fallen, then only perhaps an inch or two inches where the hooks were would have been above the level of the car, because those cranes, remember, ladies and gentlemen, are down level with the roof of the car.

And in addition thereto, we asked the gentleman, Mr. Jehue, if he looked up, and even as he looked up some 12 feet in the air, he saw that those plates were above.

And even the gentleman himself, Mr. Medina, said, ladies and gentlemen, himself, that he—and his statement, remember, I got the statement out, and I will read it to you after lunch—he stated, "I moved it, but just a little bit." I think that was the terminology he used.

There is the negligence, the only thing that could account for this.

Now, these folks knew this, and I will discuss with you, ladies and gentlemen, after lunch the conduct of the Southern Pacific Company once they knew what the facts were in this particular case.

Thank you.

Your Honor, perhaps we can take the lunch recess now?

The Court: Remember the admonition, ladies and gentlemen.

We will recess until 2:00 o'clock this afternoon.

(Thereupon, the noon recess was taken to the hour of 2:00 p.m., of the same day.)

The Court: All right, Mr. Teerlink, you may continue.

Mr. Teerlink: Thank you, Your Honor.

Ladies and gentlemen, we were discussing just at the noon recess that in this case there are really two bases for liability on the Southern Pacific, and I would like to review with you just briefly the evidence which I think has been uncontradicted as to the first phase, and that is negligence of Mr. Medina in raising those steel plates and dumping the plaintiff Mike Sabella into the bottom of that car.

Now, Mr. Medina himself admits he didn't—wasn't looking at the plates, merely looking at the cable. He took up the slack, and he admits he moved it, he doesn't know how much, except after the accident it had to have been raised at least two feet because that is how far he saw it. *And then, of course, he came in here at the trial, and he said just one end.* Well, you look at the pictures, and it can't be on the end, because they are held together. *And he said "two feet" on his deposition, and that is what he has stuck with.*

Mr. Richardson said the steel plates were above the top level of the car, which means that the cable had to be raised in that car. The plaintiff told you the same thing, that as he went to walk away that he felt the thing rising on him, and it belted him into the car. And the proof of the pudding is in the eating, ladies and gentlemen. He had been doing this disassembling—even the foreman, as Mr. Jehue said, had seem him 24 times cutting those cars in the same manner he was cutting this one, and he had nothing untoward happen to him. Remember this?

He cut three sections of that car, Sections 1, 2, and 3, on Friday, and they didn't suddenly fall into the bottom of that

car. And he cut Sections 4 and 5, and he walked over in order, if you folks will recall, in order to get down and put the hooks into 1 and 2, he had to walk over Sections 5, 4, and 3 and put the hooks in, and walk back over to the ladder. He said he walked over those sections after they had been cut on several occasions, and nothing had happened. Nothing had ever happened before until the man who wasn't watching what he was doing got a little careless and just lifted those plates up.

But that, even if that were not enough, ladies and gentlemen, the conduct of Southern Pacific Company, out here they had in this other respect the duty to provide him a safe place to work.

You remember that Mike said even on this occasion that he left his tacks by each of the car lines, the little pieces of tacks, so if they would snap before the crane got to tell him when there was some stress on the car, he would have to be a lot more prodigious in the way he went about it; but in the absence of that, that was the only way to cut it.

He said originally in the duty to provide him a safe place to work that when he first went out there he would cut down here (indicating) and then come over and cut down here (indicating) and call for the crane.

Now, there was the safe way to do it beyond any question of a doubt. When he did it that way, he would have to wait for the crane for a couple of hours, and he was told by his superiors—and there wasn't one man here—and you saw how readily they could bring these people in from Los Angeles when they want; they don't have any trouble getting them here; or Oakland, or Hayward—not one person came in here to say to the contrary when they had two cranes that he only cut one piece at a time, and then another piece, and another; then they abolished it, and his superintendent told him. "You cut the whole car and then call for the crane."

Now, is that the way you ask a man, and then they take the position now: well, he shouldn't have cut the car the way he did. They told him to. And they didn't bring one person here, I submit to you, ladies and gentlemen, when Mike Sabella told you that the supervisor told him to cut the whole car, that that wasn't the way he had to do it. They told him how he had to do it, and he did it just like they told him.

And what is the conduct now of the Southern Pacific Company? You would think, ladies and gentlemen, as you review this case, here is Mike Sabella doing what he had been told to do, a loyal employee for 36 years, one day off because he dropped a little bar on his toe, one day in 36 years of working, and all this heavy equipment and cutting; this tells you what kind of a workman he was; this tells you he was a careful workman. Mr. Richardson said so. Even Mr. Jehue said he was a good workman.

And his work record proves and what he told you, it was not true he was off more than one day; they have all the records there. *And this is the type of man that he was, dedicated 36 years of his life, and then on the day that he gets hurt* as a result of the carelessness and negligence of the Southern Pacific Company and their employees, *while he is on the way to the hospital, and he can't protect himself—he is now with a broken back; what are they doing? Are they sending him flowers and making sure he is all right, to a loyal employee? They are already out there taking aerial photographs.* You think they're not worried about this case the minute they heard about it? *Right from the very beginning what are they doing?*

The following day this busy foreman who has so much to do is out there holding a ruler; already, within minutes after this tragedy happened to Mike Sabella, they are out to defeat him.

As you look at this picture, ladies and gentlemen, like I say, to show how misleading pictures can be, if you folks will look just carefully when you go into the jury room—this is Defendant's Exhibit "L"—you look there and see if you can't see the head of those—I don't know if you see it the same way I do—the head of those rivets, the bolts he said he was cutting right next to. You see that right there on that picture, the little projection out there and those bolts he said he was cutting right next to. If you notice the ruler, there is a shadow behind the ruler, which means this shadow—the cut is beyond the curve. Another point.

So this, as I said, wasn't it just fortuitous that they just happened to select that one spot that was an inch and a quarter? The torch might have moved a little bit to one side. *Do you think that when they started taking aerial photographs and started taking these pictures they were there to help Mike Sabella or send him down the tubes? That is what they were doing; after 36 years of loyal service, what consideration did they give him? Nothing, except claimsmen out there to defeat the very purpose of what he did.*

Now, what did Mike Sabella do?

If it pleases the Court, may I have the file, the original file?

Talk about a loyal employee. It wasn't until March 20th, 1963, 21 months later—you can imagine what Mike went through and what he tried to do before he finally had to go and hire himself a lawyer and file a complaint to get his just dues and his just day in court; that is what he had to do, after 21 months.

And what did the Southern Pacific do during that 21 months, ladies and gentlemen?

The first thing they did was to set out to defeat him right from the beginning. Then they put him in the hospital.

The evidence will be, ladies and gentlemen, that the Southern Pacific Company contributed $7.57 per month and the

employee $3.53. *After you have been off work a year, your benefits stop, as has been indicated, at the hospital, unless the Souther Pacific Company wants to pick them up. And here is a man with a broken back,* and this is the man that the doctors say you should try and help and get him back into a useful society—*Hey, Mr. Southern Pacific, don't throw—don't dump him on the same trash pile where you dump those steel cars. This is a human being you are talking about now.*

What did they do? Did they even agree to pick up $11.50 a month to see that the poor guy got his hospitalization? No.

Mr. Phelps: If Your Honor please, *I am going to object* in view of the offer of proof I made in chambers as to what this man's actual situation was and the election he made, and *I think it is misconduct to encroach in the manner that has been done.*

Mr. Teerlink: The stipulation, as I understand, Your Honor, was that the railroad company tendered the right to pick up his hospital benefits, and they declined; that was the stipulation that you entered.

Mr. Phelps: I understand that, but you are arguing something that prevents me from answering.

The Court: Let's not go beyond the stipulation.

Mr. Teerlink: They declined to even pick up his hospital bills. And then the doctor said this man, you should give him a chance, give him a little help.

How many employees are there? There are 45,000 employees, and not all of them are union. They had 50 bosses down there. *You would think a man with 36 years, they could at least find a place for him to be a supervisor, or if they had the milk of human kindness, to give a good darn about Mike Sabella.*

What did they do instead, ladies and gentlemen. They cut off—no more hospital benefits, no more out-patient, by the time of December—

Mr. Phelps: I make the *same objection,* if Your Honor please, in view of the situation, my hands having been tied—

Mr. Teerlink: I say there are no benefits payable after December. That is the evidence.

Mr. Phelps: "What did the Southern Pacific Company do when you"—

The Court: Let's—

Mr. Phelps: —*I object to that and assign it as misconduct.*

Mr. Teerlink: That is the evidence, Your Honor. He had no benefits after December.

The Court: I know, but you are going beyond that.

Mr. Phelps: You foreclosed me.

The Court: Let's stay within the confines.

Mr. Teerlink: Now, you go on a step further than their own doctors in those hospital records—when they examine you—they said that this man could not return to his job, could not return to the job that he had before; they said that he was disqualified and would be in the future—the Southern Pacific Company doctors—and you heard Dr. Bluhm come in and give you an intelligent reason why; you don't break a man's back and crush that vertebrae and put him all in different positions, destroy all of the soft tissues, and all the things that support that back, and then suddenly turn around and say, "Well, the man is well," because nobody, not even the doctor that they had examine him at their request, who wasn't brought here, just on January 15th—they have the privilege under the law, ladies and gentlemen, to call any doctor of their choosing, anyone, and have our man present himself for an examination, and have that doctor come in and testify if they so desire; and the Court will tell you that if they fail to produce evidence of that nature, it may very well suggest to you that it would be adverse; so not one doctor has been here to testify or tell you that Mike Sabella could ever go back to being a carman-cutter or doing a carman's job.

And then the crowning glory, the last witness, just before we are to argue—not the first one in their case, so we could go to Los Angeles and bring up a few of the boys—. That was—*Do you think that was strategy? This is the way they play the ball game. They don't know how to play it fair. The last witness, ladies and gentlemen, is, lo and behold, McLaughlin—*

Mr. Phelps: *I object and assign that as misconduct:* "They don't know how to play it fair." There is a case that this very firm has been reversed for, argument of a similar nature, *and I assign it as misconduct and ask for a mistrial.*

The Court: *Motion denied.*

Mr. Teerlink: The last witness, ladies and gentlemen, low and behold, when he walked in, *I almost dropped my false plates. If it wasn't old McLaughlin. Yes, sirree. How about them barrell of apples?* It sure is a small world. And here stands a guy and says, ladies and gentlemen, guess what? "You know, we really like old Mike. His job is really available for him. Why, it has been vacant for all these years—these three years. All he has to do is walk in."

Now, what do they expect you—Do they think you people are unintelligent? After the conduct—You mean, you treat a man like that for three years, and then you bring in the superintendent to say their is a job available. What job? Well, he could go back to being a carman and go in the tool room.

And here is the ironical note: The earlier testimony was from Mr. Jehue that they cannot abolish those torch cutting jobs until the man dies. Then the job is abolished.

And this superintendent says that he had to go back to his old job first, then that job had to be abolished, and then he could bid in on the tool room. How do you do that?

But I went one step further, and I said, "Well, what do these men do when they are not cutting?"

"Well, they are carmen's helpers."

"What does a carman's helper have to do?"

"Oh, you know, a few odds and ends."

And I said, "How about in the tool room? How heavy are the tools?"

He said, "Some of them get up there pretty heavy, 35, 50, 100 pounds."

I said, "Well, does the tool man have to pick them up?"

"Oh, no," he says, "the carman's helper can do that."

So he's got Mike coming and going either way.

Now, that is the conduct. Not once, in other words, did Mike Sabella—he was here and testified earlier; I put him back on for a second time—that he presented himself to the superintendent and gave the name of that man; you didn't see them bring him up here to testify that Mike had been there. This is one of their superintendents. He gave the name. This was the second day of trial, last Tuesday. Today is Thursday. That man is not here to testify that Mike and those two union members didn't show up, and when you show up with your general chairman and the vice chairman of your union, and you don't get a job, you are never going to get a job with that Southern Pacific Company so long as you live, and you know it.

And when *Mike just got back on again, to just reiterate what he told you once before, they don't bring anybody in here to contradict that—no, sir; he's just good old "Mack." He's come a long way. I wonder how many people he's stepped on to get there.*

That is the conduct, ladies and gentlemen.

The testimony and the medical is uncontradicted. You judge people, you know you judge them, ladies and gentlemen, and I submit to you on the conduct, *people just don't suddenly—are good people for 56 years of their lives,* you

know, good, sound, solid, American citizens, *and then suddenly when somebody busts their back they become a crook;* that isn't the way we are made, and Mike Sabella gave 36 years of his life to that railroad; and who then came in here and told you how he feels and what has happened to him? Many mornings he can't even get out of bed. Dr. Bluhm explained exactly the causes for it and told you that it is permanent, and the most he could ever hope to do would be to try and fuse it, and he said a man of his age, it wouldn't do any good. So he has to live with that constant plain and that aching and that walking around with a limp.

And then if you think this man wasn't hurt and hasn't been hurt for three years, the condition you see him in here, *you would think if they can take aerial photographs and cut pieces out of cars, and boy! what a production they made when I suggested that somebody wasn't hoodwinking an old rail. When I saw that car out there, it wasn't on any rip track.*

Boy! did you see how fast they had the boys in here? Just like Jack the Bear! You'd better believe it!

And with Mike, here is a man who, if he were putting on in this courtroom, do you think they wouldn't have some keystone here to tell you about it? *Do you think they haven't followed him and checked him and checked him and know more about what he has done the last three years than he knows himself?* Nothing; void, because Mike is a crippled man for life, and the doctors explained it to you, and you folks know, and it is uncontradicted in this case, and that is why I say to you, ladies and gentlemen, *despite it all, despite every roadblock they put there, Mike still is having his day in court.*

And it is up to you folks to see after three and a half years that he gets the fair and just treatment for the first time in three and a half years that he is rightfully entitled to.

As I said, a guy that has been honest with that company for 36 years, and then you ask yourselves, "Are we living in the twentieth century?" Now, ladies and gentlemen, I think without any question of a doubt—*I know the real reason we are here: the reason is that here they may creat a little confusion, get some of you people to shortchange him, and then they have won, because you folks cut down on what he is otherwise entitled to. That is just money back in the Southern Pacific coffers. And this is why all this fuss* about cutting this car an inch here and half an inch there, is because, you see, the Judge has to instruct you on all the issues of the law; he will instruct you on negligence, duty to provide a safe place to work; he will also instruct you on contributory negligence and damages.

Now, the mere fact that he instructs on an issue doesn't mean it is necessary in a case, but it is for you to decide whether it is or is not. *And their whole defense is the hope that they might smear a little on Mike, and you might cut him by 10 or 15 or 20 percent, and they walk home and put it in their pockets.* That is all.

So I think you, ladies and gentlemen, the real key to this case—because they can't defend on liability; the liability is what is known to those of us in this particular profession as "it's open and shut"; "O. & S."—no question about it, but *they have to create a few smoke screens, throw a few red herrings around, in the hope that just—you see, all they have to do is get four of you to buy it and get the others ones to compromise, and they have accomplished everything they have set out to do.*

Now, I think, ladies and gentlemen, as the real issue in this case—and that is the element of damages. What is Mike entitled to?

The law says that he is entitled to receive, where the injury is permanent, all of his loss of income, his gross

income—nothing but his gross, and the Court will tell you that, and he is entitled to receive that for so long as he could have worked.

Here is another interesting thing: He could have worked to age 70. Did you hear that superintendent say, or anybody tell you he couldn't work to 70? No, sir. Many of them do. *With the cost of living what it is today, ladies and gentlemen, you almost have to work unless you were fortunate to have a silver spoon in your mouth. You don't ever get a silver spoon in your mouth if you spend 36 years with the Southern Pacific.*

So I say, ladies and gentlemen, that during the last five and a half months that he worked, and that is in evidence, his monthly income, or total income—I divided it by six, and it amounted to $464 per month was the actual gross income. In addition thereto at that time when he was working, he got the company to contribute another $6.85 when he had a policy on one, and $3.80 on another policy; that is $9.93 a month he was getting then.

He had a union job, and this here is the thing. You know, sometimes I know that there is—I like to call a spade a spade; some people say, "Well, I don't like to."

Can you imagine what this poor guy's life would be like if he didn't have a little representation? He wouldn't have a chance. So he was an honest enough man that the union members trusted *little Mike Sabella, with a 12th grade education—7th grade education,* into being their union treasurer, for which he was getting $25.50, plus the hospital benefits that he was getting then of $7.57, which takes it to slightly over $500 per month. That was for the year 1961. In other words, $500 per month is about $6,000 a year.

In 1961 he would have lost half of the year because he was injured on the 19th of June, plus he got two weeks vacation, so that would be $3,000.

In 1962 they got a raise of $192 per pear, so he lost $6,192.

The same was true in 1963.

On January 1, 1964 they got a $14 a month raise, or $300, making a total of $360; $6,360.

In 1965, on January 1, another $14 raise, so that he was—had he been back to work in 1965, he would have been making $6,528.

In 1966, on January 1, was the last of the—the raise was again to be $14 a month, or $6,696.

So, ladies and gentlemen, to December 31, 1966, his total wage loss would be $34,968. That is actual cold, hard cash that the Southern Pacific Company has deprived him of.

In addition thereto, remember, he just—he was born in 1905; he had just turned 56. In 1966 he would be 61. He would have nine years to work, and without any further wage increases, his life expectancy at age 70 would be nine additional years at $6,696 per year, which is $60,264, or a total of $95,232, his actual loss right out of his pocket that any accountant can figure out; that is what they have taken away from him.

Now, the law says, in addition to that, ladies and gentlemen, he is entitled to be compensated for physical pain and suffering, for mental worry, distress, and grief and mortification, what those doctors have found. What Dr. Newberg said, you know, try to make a useful person out of him if you can, *and you ask yourself, "How does a man age 59, who has had a broken back, who walks with a limp, with a seventh grade education, get a job?" In the old days at least you could sell apples, but with your supermarkets you can't sell them as cheap as the supermarkets do; nobody will buy your apples.*

Where does Mike go? Where does a guy go at that age? I will tell you; No other employer is going to take over his problems for him, because, as you know, all other employers

have to carry workmen's compensation, and if a guy goes and gets injured, he's already got a bad back, guess who is stuck with it? He is. So he's not taking on the Southern Pacific's burdens. No. You better believe it. They don't. That is why they don't touch a man with a low back.

The Court will tell you that he will live 18.22 years; 18 years is his life expectancy, which is the guide that you are privileged to use.

I say to you, ladies and gentlemen, and I know that you know when we start talking about the pleasures and satisfactions of life, *there isn't a person in this room—we are talking about getting rid of pain*—when you go to a dentist's office, and the dentist says, "You are going to get a toothache; does it hurt very bad?" "It is killing me." "I'll tell you what I'll do: for five dollars, I'll pull it out with no novocaine; it just comes out the hard way; for fifteen bucks, I'll give you a shot of novocaine;" so you are free from pain while he is extracting that tooth; *to be free from pain, there isn't a soul in this world who wouldn't say, "Doctor, here is the fifteen bucks to be free from pain* when you are pulling that tooth"; *and he is having that tooth extracted out of his back every hour, every day;* he has and will have for the rest of his life.

I say, ladies and gentlemen, if you give—decided he was entitled to $10 a day—

Mr. Phelps: Just a moment. I will object to that. The unit of paying rule—

Mr. Teerlink: Has the Supreme Court yet reversed itself? The same decision—The decision, as I understand it, was four to three, Your Honor, and there has never been a ruling. Now three and a half years old, the majority is still holding proper—

Mr. Phelps: Your Honor, I assign it as misconduct and ask Your Honor to instruct the jury to disregard it and instruct counsel not to argue it.

The Court: That decision you have reference to holds in effect that the unit method of paying is not permissible.

Mr. Teerlink: Your Houor, isn't that the minority?

The Court: No. The decision held that if it had been presented—well, let's not go into the fact. I am very familiar with the decision.

You are instructed not to use that unit method.

The jury is instructed to disregard what has been said so far on that.

Mr. Teerlink: All right.

In any event, the Court will give you his life expectancy, 18 years; that is 6,570 days of life left.

You folks figure what it is worth. I say for that 6,570 days of life left, he is going to live for the rest of his natural days, and what he's got now in a back support, pain, all the times he told you, not one day has he been free of it, not one hour, that you give him $65,700.

Figure it any way you want to. That is your privilege. That is your obligation. You just see that he gets what is fair, and if my figures are correct, ladies and gentlemen, that totals up to $160,932. You folks are the final judges. I can only give you what I honestly believe is fair and just in a case of this kind.

I have a brief opportunity to address you again, because, as you know, plaintiff has to prove their case by a preponderance of the evidence. Therefore, when Mr. Phelps completes his argument, I have the privilege of rebutting what he has to say. *When he is discussing the case with you,* I know this is what you would want to do, and *I know that you will distinguish between facts and smokescreens,* because the facts are clear, and I am sure you folks are uncontradicted as to how the accident happened.

Don't let the Southern Pacific throw up a smokescreen through their counsel, because, you know, they hire the best,

and Mr. Phelps and I—we have had a go-around before, and we will probably have a go-around again, *and they don't hire any stumblebums; they are pretty good; it's their job, and their job is to confuse and do what they're supposed to do*—to to help the Southern Pacific. But keep that in mind. *That is his job. But don't let him get that smoke too close to you, otherwise you can't see the forest for the trees.*

Thank you, ladies and gentlemen.

CLOSING ARGUMENT

By Mr. Teerlink:

If it please the Court, Mr. Phelps and ladies and gentlemen:

The hour is late, and I am going to be as brief as possible. There are a few things I would like to comment on that may be of some help to you in trying to decide the case.

Sometimes I feel that at this stage of the proceeding maybe I would be better off just to sit down and keep still, because I have a bad Dutch temper, and sometimes it really gets to a par of boiling around about this stage of the game. I try to keep it under control.

Incidentally, ladies and gentlemen, if anything I have done in the presentation of this case which to you doesn't seem right, if I let that temper get away once in a while, please don't take it out on Mike, take it out on me after this trial; work me up one side and down the other; let me know, and I will try not to do it again.

Now, I thought I mentioned to you—I am sure I did, because I could see the painting of these fine people, the Southern Pacific, trying to paint. *I think I said to you that the end result of what he is going to say is compromise,* and, *sure enough, after 40 minutes, the last thing that comes out of his mouth was to cut the verdict, compromise, after he had tried to inflame you with half truths and half pictures*

and half of this and misstatements of the evidence and partial statements; without it all, he ended up right where I thought he was going to be: *cut the verdict, just cut it down somewhere, because any time you cut it down, that is just more money back in their pockets, you see, and if they play the game long enough, they usually end up on top; that is, their playing the percentages; that is all,* and that is what they are playing in this particular case.

For example, the first misstatement was—Dr. Phipps, or the last one, one of the last ones—Dr. Phipps said, "I do not think he can be helped with orthopedic measures so that he will function better. The prognosis is quite poor."

"Prognosis"—that means the future hope for this man is poor. "And I think maybe you had better do something about it. I think you'd better do something to help him." They didn't even follow their own special consultant's advice, and he said that this man was conscious of his lawsuit. This is his interpretation, what Dr. Phipps said.

Well, I read you the complaint. It wasn't, this report, ladies and gentlemen, was written in 1962, and Mike's sitting there waiting for them to do something for him, anything and it was a year later before he finally realized—*finally, after 36 years of being a lowly oh-so, he figured "they really are"—"I couldn't believe it, but they're really throwing me on the human trash pile."* Then he had to hire a lawyer—one year later. So this idea of Dr. Phipps' was, thinking that, he thought that Dr. Phipps was thinking about a claim, there was no suit, there were no lawyers. He was in the last of the claims department. You saw what they did to him. You saw the thanks he got. *He got just exactly what they give to any poor guy with a seventh grade education: he got nothing.*

Now, we have had a lot of talk here. Then he said, *"The plaintiff is faking this thing,"* the last—or words to that effect. That is what it meant.

Mr. Phelps: *I will object to that,* if Your Honor please. *If he is going to quote me—*

The Court: *Well, it is a matter of semantics. He may comment.*

Mr. Teerlink: The last thing, I asked Dr. Newberg, "Doctor, do you agree with this statement: Mike Sabella is not a malingerer; do you agree with that statement?"

And he said, "Yes, sir; I agree with that statement."

And then they talked to you about this job. Where is the job? Where is the testimony that they offered him anything? *They employ 45,000 people, and they couldn't make room for him to do anything—maybe even delivering the messages down at 65 Market Street;* you mean to tell me, ladies and gentlemen, *if you have got the good will of your employee at stake that you won't at least call him up and say—*

Mr. Phelps: *I am going to object to this on the same ground and cite it as misconduct.* Your Honor knows what the situation is. Your Honor knows what I was foreclosed from, and I think that this is improper argument.

The Court: Just a moment.

Mr. Phelps: Your Honor knows what the situation was.

The Court: Let's keep it within the confines of the evidence.

Mr. Teerlink: Now, ladies and gentlemen, isn't it interesting to you, *when they've got all these pictures, where is that claims man with the rest of the pictures they didn't show?* He has been around here for two weeks, and we haven't seen or heard from him.

Mr. Phelps: *Just a moment.* He is implying—You told me you didn't want him this morning.

Mr. Teerlink: Only—

Mr. Phelps: You told me you didn't want him. I had him here at your request.

Mr. Teerlink: *Sit down and let me finish my argument.*

The Court: *All right, gentlemen; we have a time limit. Please.*

Mr. Phelps: *Don't misstate it. You can't—*

Mr. Teerlink: *Does it seem ironical to you, ladies and gentlemen, that they can take aerial photographs—*

Mr. Phelps: *I—*

Mr. Teerlink: *Will you keep out of my argument.*

—that they can take aerial photographs within a few hours or less than that? Imagine getting an airplane and camera equipment and start shooting photographs to defeat a claim—and rulers, when all they would have had to do—this car was being cut up for junk; *if these pictures are true representations,* ladies and gentlemen, *and not a clever means of a claims department who is looking and shooting films from an angle that makes things look different than what they are, wouldn't it have brought in to you the pieces of junk?* They have them. But they wouldn't support what could be cleverly shown in a picture. For example, ladies and gentlemen, here is the Z-iron. Take a look at this picture; look at the width of that Z-iron. You see how a camera distorts that picture there? This Z-iron looks like it is at least —well, at least a foot wide, when in truth and fact you can see, one point here, ladies and gentlemen, it is less than two or three inches. That is just one example of what they can do.

And I show you folks that other picture where the rivets could be shown—I forget which one. You look through them. I won't take up the time, because our time is limited. The one picture, you can see where the ruler is being stuck; you can see the rivets right there, and if they were so concerned, they took measurements of those rivets, and this was their theory right from the beginning, to prove that this thing had buckled and just dropped.

With all of the engineering department, they have all the skilled employees by the thousands—do you think if this car had in truth and in fact buckled, and this was their defense,

and they knew this was going to be their defense, because they already had the ruler out, that they wouldn't have had one of their engineers go out there and take these measurements? They would have had that thing with a transit and an expert engineer; they would have gotten somebody from U.C., U.C.L.A.; they would have had that whole car recreaed in here, ladies and gentlemen; they would have had the facts for you, because they were the only ones that could have.

Mike Sabella was lying on his back with a busted back thinking maybe they were going to do something decent for him, maybe once in a life the friendly Southern Pacific could be friendly. No, sir. All we get is a second best, a lousy evidence that they decide to bring in.

You see, all the pictures that may show it to his advantage, you don't see them.

Mr. Phelps: *Now—*

Mr. Teerlink: *They are not here.*

Mr. Phelps: *I will object to that and assign it as misconduct.* This is, again, characteristic of the defense and *without any evidence, without justification,* and the type of thing that the Courts have said is not proper, and *I object to it.*

The Court: *Go ahead.*

Mr. Teerlink: *So the whole defense here,* ladies and gentlemen, involves over whether Mike Sabella—*this is the testimony they created within minutes after this accident happened.* Now, with *all the resources at their command,* if it were really the findings, do you think they would have to go out and get some old boxcar and bring it in here, *if they were careful enough to hire an airplane to take aerial photographs within minutes, take—have a claims manager in there—*

Mr. Phelps: *No evidence of that,* if Your Honor please, *absolutely none. It is not the fact.*

Mr. Teerlink: Well, you were the one that told me they were aerial photographs.

Mr. Phelps: I did not.

Mr. Teerlink: You certainly did.

Mr. Phelps: They were taken from a tower. I can show you the tower.

Mr. Teerlink: Taken from the tower? I though it was an aerial photograph.

Mr. Phelps: I never did, and you know it.

Mr. Teerlink: *Beautiful pictures. But you only get what they want you to see.* What a difference it would have been if Mike had had a chance to get out there and get the real facts, because the proof is right there, ladies and gentlemen. Not one other car that Mike had ever cut in the same manner ever fell on him, only the time when a guy lifted up the crane and admitted he lifted the crane, that is when he went down. And as was indicated here, I don't like to be repetitious, but if this car had been sprung—that was their defense; this wasn't something he thought up recently; *they were looking for a defense of this case right from the beginning*—they would have had in a mass of evidence here, ladies and gentlemen, *that would have surprised and amazed you at the talents these people have. When it is against them, they bring in less than what is the best. That is the whole story of this case.*

Then what do they do? I get a kick out of this. The fellow I bring up, Richardson—and he reads out of context what Richardson tells you. "I never even kept any little tacks. I just cut all the way around. Mike was safer than I was. He left the little tacks. Mike was a good workman. He was a safe workman."

And how do they get around this idea?

He says, "Well, you know what Mike—we had two cranes

there; it would have taken an extra hour for each section. The crane operator would have had to wait there for an hour." This is five hours, five hours to take that roof off. Maybe what they are paying him—I don't know how much they pay a crane operator, but, you see, *they would rather gamble on a $160,000 lawsuit than they would take care of their man.* And the law says that they have a duty to provide him with ample and sufficient equipment to properly and safely do his job, and when he was doing it the proper and the safe way, he thought out—they started cutting out the equipment on him, and then they stand here and say, "We can't"—the Southern Pacific, they can't afford to have a crane operator sit there for an hour, but when Mike calls for the crane, he still had to wait an hour and 15 minutes. And they want you to swallow that.

I say to you, ladies and gentlemen, that *when you put this whole case together, it stacks up to just one big game for the Southern Pacific Company,* and you folks have seen it; *It is now in your hands, to make sure that they are not going to get away with what they set out to do within a few minutes after this accident happened; thousands for defense, pictures, claimsmen, big lawyers—but nothing for Mike Sabella, a trusted employee for 35 years, and they call that fair play; they call that the twentieth century.*

Now, what about poor Mr. Medina? What do you think poor Mr. Medina must think when he sees and he knows what they are doing to Mike? *What would happen to poor Medina if he didn't go along with it? Ever think about that?*

When they see how they threw him on the human trash pile, how quick would they give it to Medina if he didn't go along—

Mr. Phelps: Your Honor, *I object again and cite this as misconduct* in view of the fact I was foreclosed from proving

that isn't the fact as to what we did or what was done for this man, and I cannot stand still and listen to this, knowing what the facts are.

Mr. Teerlink: *The report of Mr. Medina that he signs, do they let Mr. Medina sit down and write his own report as to what happened? No, sir. Guess who writes it out for him? He just signs it.*

I asked him, "Is that your handwriting?"

"No, that is my signature."

You can readily see that it is not. *Somebody else comes in and says, "Mr. Medina, sign it."*

And how long do you think he would be out there if he didn't sign it?

Then when we took a deposition of him, in the questions of the deposition, you take about 30 or 40 pages, and you just keep hitting those questions home, and eventually the truth will come out, *and you can look,* ladies and gentlemen, if you have been in this business for a while, *and you can look at the sorrowful look in a man's eye when you are taking his deposition, and they cry out to you, "I would like to help you, Mr. Teerlink, but I can't; I've got to send him down the tubes; it is him or me,"* and that is the way you see it.

Mr. Phelps: *If Your Honor please, "down the tubes,"* when this man is down—the situation is such, Your Honor please, I am foreclosed from saying it—

Mr. Teerlink: You've said that about 14 times.

Mr. Phelps: The ruling—

Mr. Teerlink: You haven't given him a job; that is for sure.

Mr. Phelps: *That is just—Now, there we go again.*

If Your Honor please, instruct Mr. Teerlink to desist from that. *I assign it again as misconduct and move for a mistrial* in view of that offer that I made of proof.

The Court: *Denied. Proceed.*

Mr. Teerlink: Now, he said, "Now, the proof of it is because the fifth section went down. That proved he cut it wrong."

What did the plaintiff, Mike Sabella, tell you? That the two sections, when they were pulled up on him and dropped him down, were swinging back and forth, and he looked up and thought it was going to come down and cut him in half. He saw them hit and knock that fifth section out.

These are some of the misstatements that churn and boil your blood. This is what it does. There it is, ladies and gentlemen.

I could go on and on. There are a lot more things I would like to say, but I say this to you, ladies and gentlemen: I don't know how you criticize this. I figured that out for you and gave it to you and wrote it out for you. This is December —since June 19th, with the raises, plus the loss of the insurance premiums, plus the loss of his job, *plus the loss of his hospital benefits that were paid in.*

Now, what does he have? Zero. This is the loss up to December 31st, 1966, nine years, at the—I think I indicated to you, ladies and gentlemen—I have it here—he complains about that; after 1966, under the present agreement, he would have been making $6,696 per year. This is what they owe Mike Sabella. This is what the law says.

And as to that *6,570 days of misery he has got left, there isn't a soul in this world that would put up with what Mike Sabella is going to have to put up with, the hopelessness of it all, for a measly figure we have got down there.*

I say this, ladies and gentlemen, because you know it is so easy—it is so easy when somebody else is going to say, "Well, that sounds like a lot of money," *but there isn't a soul who would spend any sum of money to be placed where Mike Sabella is.*

What you have to do is—you have to be reasonable; you have to take some figure that sounds what is fair. What does it mean to have all day, every day, a future to look forward to waking up in the morning when you can't even get out of bed. Because of why? Because of the Southern Pacific Company and the way they run their job out there.

So those figures are fair and just. Some of you folks may want to give more, some may want to give less. One thing for sure, this is left to your sound discretion, ladies and gentlemen, because that is from all walks of life, when nine out of twelve agree what it is worth for that 18 years of pain and suffering, that is that figure. But here there is evidence that is uncontradicted. No one will come in to tell you what he is going to lose. No one is—All the testimony is that he cannot be rehabilitated, will not be rehabilitated. So these figures here, ladies and gentlemen, some ninety-four thousand—almost $95,000, are fixed and have never been touched. Then what is left to your discretion is what is fair and just for pain and suffering.

Now, ladies and gentlemen, it is four minutes to 4:00. One thing I am sure that you know for sure now if you never knew it before, and that is, lawyers sure can talk a lot. And, unfortunately, we do, but we do it out of an abundance of caution, because I can tell you, ladies and gentlemen, that it is—you have to believe—you have to believe in guys like Mike Sabella. When you believe, then you can do the best job. You have a heck of a lot of responsibility, because his whole future is right here in our hands. Things I do, or if I goof, you see, Mike pays for it; I don't. So I am just trusting in you folks, as I did when I first selected you. You will evaluate this testimony in the light as you see it to be; that you evaluate these damages, and that you see that Mike gets his fair and just verdict. *You tell the Southern Pacific*

in that verdict it is high time to quit treating their employees that way.

Thank you.

The Court: Ladies and gentlemen, remember the admonition not to discuss the case, and so forth.

We will recess now until 10:00 o'clock tomorrow morning, at which time I will instruct you on the law and give you the case for your consideration.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1327

SOUTHERN PACIFIC COMPANY, a Corporation,

Petitioner,

vs.

MIKE SABELLA,

Respondent.

On a Petition for a Writ of Certiorari to the Supreme Court of the State of California

BRIEF OF RESPONDENT IN OPPOSITION

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---

BRIEF OF RESPONDENT IN OPPOSITION

OPINIONS BELOW.

The opinion of the Supreme Court of the State of California is reported in 70 A.C. 323, 74 Cal. Rptr. 534, 449 P. 2d 750.

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Four, is

reported in 262 A.C.A. 582, 68 Cal. Rptr. 896. (Under California law, by the order of transfer to the Supreme Court of the State of California, the opinion and decision of the California Court of Appeal has become a nullity and without any force or effect, either as a judgment or as an authoritative statement of any principle of law therein discussed. *Ponce v. Marr*, 47 Cal. 2d 159, 301 P. 2d 837; *Knouse v. Nimocks*, 8 Cal. 2d 482, 66 P. 2d 438).

JURISDICTION.

The judgment of the Supreme Court of California which is sought to be reviewed is based upon an adequate and independent state ground. No question or claim within the purview of 28 U.S.C., Section 1257(3), has been properly raised by petitioner. The decision of the California Supreme Court is based solely upon the application of a sound and well settled state rule of procedure, which has been uniformly and consistently applied in all civil actions tried in the courts of California. No federal question of any substance has been presented by petitioner.

QUESTIONS PRESENTED.

1. Whether any federal question requiring review by this Court arises out of the affirmance by the highest court of a state of a judgment in favor of the plaintiff in an action tried before a jury in a lower state court

under the Federal Employers' Liability Act, where the highest state court, in affirming such judgment, as reduced by a remittitur in the lower court, has based its decision upon the following conclusions: (a) the trial judge acted properly in ordering a remittitur on grounds which related solely to the issue of damages; (b) since there has been no contention that the damages, as reduced by the remittitur, are excessive, both the application and the result of the remittitur were proper; (c) by necessary implication, the trial judge, in ruling upon the defendant's motion for a new trial, rejected the contention that plaintiff's counsel had been guilty of prejudicial misconduct; and (d) assuming for the purposes of discussion that plaintiff's counsel had made statements which were improper and prejudicial and which went to the issue of liability, defendant's claim of misconduct was nevertheless not entitled to consideration, since defendant had failed to take the proper procedural steps at the trial to preserve the issue of prejudice on appeal.

2. Whether in an action tried in a state court under the Federal Employers' Liability Act, the defendant has an absolute right, on an appeal from a judgment in favor of the plaintiff, to raise a claim of prejudicial misconduct on the part of the plaintiff's counsel, notwithstanding the fact that such defendant had ignored and had failed to comply with a firmly established state rule of procedure requiring all litigants in all civil actions to make proper and timely objections and to request admonitions to the jury, whenever an

admonition would be effective, in order to preserve the right to assert on appeal a claim of prejudicial misconduct on the part of counsel for the prevailing party.

STATEMENT OF THE CASE.

In 1961 the plaintiff, a fifty-six year old carman cutter employed by the defendant, was injured when a section of a car roof, which the plaintiff had previously cut with an acetylene torch and upon which he was then walking, was prematurely and negligently lifted up into the air by the defendant's crane operator. The latter denied that he had moved the section of the roof at all, but he was impeached on this point by his own testimony. The defendant's theory of contributory negligence was that, in cutting the section of the roof, the plaintiff had failed to leave a sufficient overlap and that the accident was caused by the claimed inadequacy of the overlap. The defendant had no rules or regulations concerning the size of the overlap, and no instructions on this subject were given to the plaintiff during his thirty-six years as a cutter. No witness testified that the manner in which the plaintiff had cut the roof section could have caused, or that it did in fact cause, the roof section to fall. Since the accident the plaintiff has never worked again, and he testified that the defendant never offered him a job.

On February 1, 1965, the jury returned an unanimous verdict in favor of the plaintiff in the amount of $115,500.00. The defendant moved for a new trial on a number of grounds, including (a) excessive dam-

ages; (b) error of law in refusing to receive evidence that the plaintiff had applied for a disability pension under the Railroad Retirement Act; and (c) misconduct on the part of plaintiff's counsel. The trial Court made a conditional new trial order. It found that the evidence was insufficient to sustain the verdict and that there had been an error of law prejudicial to the defendant. It did *not* find that there had been any prejudicial misconduct on the part of the plaintiff's counsel. On the basis of its findings, the trial Court attempted to bring the litigation to an expeditious and reasonable termination by exercising its power of remittitur. On March 29, 1965, it ordered that unless the plaintiff would consent to remit $35,500.00, a new trial would be granted. The plaintiff, who was then almost sixty years of age, consented. Thereafter, the defendant appealed from the judgment, as reduced to the amount of $80,000.00.

On appeal it was agreed by the parties that both of the grounds upon which the trial Court's conditional new trial order was based related solely to the amount of the damages and not to the issue of liability. It was also agreed that the single "error in law" referred to by the trial Court related to the claimed error in excluding the evidence relating to the disability pension.

On May 28, 1968, the Court of Appeal of the State of California, First Appellate District, Division Four, reversed the judgment on the sole ground of misconduct on the part of plaintiff's counsel. The Court of Appeal rejected defendant's contention that the ex-

clusion of the evidence relating to the disability pension was error. It indulged in an assumption, however, that the trial judge might have found prejudicial misconduct on the part of plaintiff's counsel and that he might have attempted to correct the effect of such misconduct by reducing the amount of the judgment. On the basis of this unwarranted assumption, the Court of Appeal held that even though plaintiff "had a good case" and even though the judgment as reduced was not excessive, it must be reversed. It acknowledged that defendant's counsel never requested any admonitions to the jury, but it held that "conforming with a precise ritual" was not necessary in this case.

The Supreme Court of California granted plaintiff's petition for a hearing, and on February 7, 1969, it affirmed the judgment. It held that whether or not the exclusion of the evidence relating to the disability pension was error, the remittitur was proper, since the trial Court had based its order upon a consideration of all the evidence relating to damages, including the rejected evidence. It also held that the result of the remittitur was proper, since the only defect related to the measure of damages and there was no contention that the damages as reduced were excessive.

The California Supreme Court also rejected defendant's claim of prejudicial misconduct on the part of plaintiff's counsel. It did *not* overrule the trial Court's necessarily implied finding that there had been no such prejudicial misconduct. It did assume, for the purposes of discussion, that there had been prejudicial misconduct which went to the issue of liability, but

it held that defendant had waived the claim of misconduct by its failure to take proper steps to preserve the issue of prejudice on appeal. The California Supreme Court pointed out that the defendant had remained silent as to all but one line of argument and that as to the latter it had objected, but it had failed at any time to request an admonition to the jury. (It was also pointed out that a number of defendant's objections included an improper attempt to inject by indirect reference the excluded evidence relating to the plaintiff's disability pension). The California Supreme Court held that "the long established procedure of admonishing the jury" is not a meaningless ritual, but a rule of procedure which has been designed through judicial experience to prevent by timely words of caution the very problem involved in this case. It was held that an admonition would have been effective, especially if requested at the outset, and in the particular circumstances of this case, the defendant's failure to request an admonition precluded a consideration of its claims of misconduct.

The defendant did not petition the California Supreme Court for a rehearing. On March 26, 1969, the defendant's application for stay of execution and enforcement of the judgment was denied by the California Supreme Court. On April 7, 1969, defendant's application to the Honorable William O. Douglas, Associate Justice of the Supreme Court of the United States allotted to the Ninth Judicial Circuit of the United States, for a stay of execution of judgment was also denied.

ARGUMENT.

I.

THE DECISION OF THE CALIFORNIA SUPREME COURT DOES NOT PRESENT ANY FEDERAL QUESTION.

A. Neither the California trial court or the California Supreme Court has found that plaintiff's counsel was guilty of prejudicial misconduct.

The conditional new trial order entered in the California lower court specified the grounds upon which it was based. It did not mention the ground of misconduct of counsel. Consequently, as pointed out in the opinion of the California Supreme Court, the allegation of prejudicial misconduct was, by necessary implication, rejected by the trial court.

Furthermore, the California Supreme Court did not make any finding that plaintiff's counsel was guilty of misconduct which prejudiced the defendant on the issue of liability. It merely assumed for purposes of discussion that this was so, and it held that if there had been such prejudicial misconduct, and if defendant had preserved the issue for appellate consideration, the effect of the assumed prejudice could not be cured by remittitur. It held, however, that defendant had failed to preserve the issue of prejudice on appeal, so that it was unnecessary to reach this issue on the merits.

The California Supreme Court acknowledged that the trial judge is in a better position than an appellate Court to determine whether a verdict resulted wholly, or in part, from the asserted misconduct of counsel and his conclusion in the matter will not be disturbed unless, under all the circumstances, it is plainly wrong. The California Supreme Court has not held that the trial judge in this action was plainly wrong in rejecting defendant's contention of prejudicial misconduct of counsel.

This case, then, is unlike *Moquin v. Minneapolis, St. P. & S. S. M. Ry. Co.*, 283 U.S. 520, in which this Court granted a writ of certiorari limited to the question arising from the failure of the state court to grant an unconditional new trial after having made an express finding that the verdict was obtained by appeals to passion and prejudice. No such finding has been made in the present case, either by the trial court or by the California Supreme Court.

B. The decision of the California Supreme Court relating to the question of prejudicial misconduct of counsel is based solely upon the application of a well established state rule of procedure.

Questions relating to the conduct of counsel during the trial of an action under the Federal Employers' Liability Act are procedural matters which are governed by the law of the forum. (*St. Louis-San Fran-*

cisco Railway Company v. King (Okla.) 278 P. 2d 845, 850). The process of determining on appeal whether any error was committed during the trial of such an action and, if so, whether such error was prejudicial is also a matter of practice and procedure. (*King v. Schumacher,* 32 Cal. App. 2d 172, 89 P. 2d 466, cert. den. 308 U.S. 593).

It has long been the rule in California that an appellant who wishes to raise the claim of misconduct on the part of the respondent's counsel must first show, not only that he made a timely and proper objection to the offending remarks, but also that he requested the trial judge to give an appropriate admonition to the jury. In *Scott v. Times-Mirror Co.,* 181 Cal. 345, 368; 184 P. 672, 682, the California Supreme Court held:

> ". . . In no case was the court requested to instruct the jury that the conduct objected to was improper and that it was to be disregarded by them. Where the action of the trial court is not thus invoked the alleged misconduct will not be considered on appeal, if an admonition to the jury would remove the effect thereof. (*People v. Babcock,* 160 Cal. 537, [117 Pac. 549]; *Grossetti v. Swetsey,* 176 Cal. 793, [169 Pac. 687]). From an examination of the record on this point we are of the opinion that even if the plaintiff had been guilty of misconduct, an admonition from the court would have removed the effect thereof in every instance."

In *Horn v. Atchison T. & S. F. Ry. Co.,* 61 Cal. 2d 602, 611; 394 P. 2d 561, 566, cert. den., 380 U.S. 909, the California Supreme Court stated:

> "... we are aware of no California case wherein a plaintiff's verdict was reversed for misconduct during his counsel's argument in the lack of timely objections and a request that the jury be admonished where such an admonishment could be effective."

Petitioner has erroneously asserted that the California Supreme Court has ignored some earlier California decisions. These decisions have been cited in footnote 4 on page 4 of the petition. None of the cited cases support petitioner's assertion. In most of them an admonition was given by the trial judge, even though it had not been requested. On appeal, however, it was held that the misconduct was of such a character that the admonition was not effective. None of these cases stand for the rule that it is unnecessary to request an admonition where it would be effective.

In the case at hand, the California Supreme Court has specifically determined that on those few occasions when defendant's counsel did object to the remarks of plaintiff's counsel, an admonition by the trial judge would have removed any improper effect of such remarks. In holding that the failure to request an admonition at any time constituted a waiver of the claim of error, the California Supreme Court has explicitly rejected petitioner's contention that the misconduct in this case was of such a character that the exception to the rule of waiver came into operation.

New York Central Railroad Company v. Johnson, 279 U.S. 310, also cited by petitioner, is not in point. That case was tried in the federal court, and at the

trial, objections were made to certain statements of plaintiff's counsel. The objections were overruled, and exceptions were noted. Since the trial judge had overruled defendant's objections, it is obvious that it would have been pointless to request an admonition to the jury, and no admonition was requested. It was contended that the objections were not sufficiently specific to justify a reversal, but this Court held that the failure of counsel to particularize an exception would not preclude it from correcting the error.

Johnson involved the erroneous failure of a federal trial judge to sustain objections to improper argument. It did not involve a state rule of procedure which requires both objections and a request for an admonition to the jury, where such a request would be effective. There was no waiver of the right to assert error in *Johnson*, as there was in the present case.

II.

IN AN ACTION TRIED IN A STATE COURT UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, THE APPLICATION OF AN ESTABLISHED STATE RULE OF PROCEDURE REQUIRING ALL LITIGANTS IN ALL CIVIL ACTIONS, AS A PREREQUISITE TO THE PRESERVATION OF THE RIGHT TO RAISE THE CLAIM OF MISCONDUCT OF COUNSEL ON APPEAL, TO MAKE TIMELY AND PROPER OBJECTIONS AND TO REQUEST AN ADMONITION TO THE JURY, WHENEVER SUCH AN ADMONITION WOULD BE EFFECTIVE, DOES NOT DEFEAT, DIMINISH OR DESTROY ANY SUBSTANTIVE RIGHT OR DEFENSE ARISING UNDER THE ACT.

A. In an action tried in a state court under the act, the right to a jury trial is subject to those procedural rules of the forum which do not defeat or diminish any substantive rights or defenses arising under the act.

A state court may apply its own procedural rules concerning the mechanics of a jury trial in an action under the Federal Employers' Liability Act. (*Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211). It is only when a state procedural rule impairs or interferes with a substantive right or defense under the Act that it will be held inapplicable. (*Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359).

Petitioner has cited several decisions involving local rules or practice which, although superficially "procedural" in nature, actually had a substantive impact upon the nature of the rights created by the Act. (E.g., *Davis v. Virginian R. Co.*, 361 U.S. 354 (state court's erroneous determination that employee's evidence was insufficient to require submission to jury); *Arnold v. Panhandle & S. F. R. Co.*, 353 U.S. 360 (state court's erroneous application of state rule that general verdict must yield to inconsistent special verdicts); *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359 (state rule denying any right to jury trial on question of validity of release given by employee); *Brown v. Western Ry. of Alabama*, 342 U.S. 359 (state court's erroneous determination of sufficiency of allegations in employee's complaint); *Brady v. Southern R. Co.*, 320 U.S. 467 (state court's erroneous determination that evidence was insufficient to support verdict for employee); *Central Vermont R. Co. v. White*, 238 U.S. 507 (state court's erroneous application of state rule imposing upon plaintiff the burden of disproving contributory negligence).

None of these decisions support the contention that a state rule requiring timely and proper objections and a request for an admonition, where an admonition would be effective, is inapplicable in an action tried in the state court under the Act. Such a rule does not in any way impair or diminish the substantive rights of the parties. It is a rule which is universally recognized in one form or another. It does not interfere with or attempt to modify any of the incidents of the

Act. The parties are left entirely free to assert all of their rights and defenses. It merely requires them to make a timely and proper protest whenever they deem themselves aggrieved by any statements of opposing counsel and to make a timely and proper request that the trial judge give an appropriate admonition to the jury. This is a reasonable and salutary requirement, and compliance with such a rule imposes no undue burden whatsoever on any litigant.

The California Supreme Court has held that this procedural rule is remedial in nature and that it is designed to obviate the necessity for expensive and burdensome retrials. (See, *Horn v. Atchison, T. & S. F. Ry. Co.*, 61 Cal. 2d 602, 394 P. 2d 561, cert. den. 380 U.S. 909). It is not a rigid and inflexible rule, but it is subject to a reasonable exception whenever it appears that the asserted misconduct was of such unusual character that its effect could not have been cured by any action of the trial judge. The application of such a procedural rule clearly does not diminish or defeat any substantive right or defense under the Act.

B. The California Supreme Court's determination that the defendant did not preserve the right to raise the claim of misconduct on appeal does not give rise to any federal question.

The record in this case fully supports the California Supreme Court's determination that, by its failure

to comply with a well established procedural rule, the defendant has waived its right to complain about misconduct of counsel on its appeal. Defendant made no objection of any kind to most of the asserted misconduct. On pages 12-15 of defendant's petition, it has thrown together more than thirty instances of "misconduct," all lifted out of context. However, it objected to only about ten percent of these remarks, remaining totally quiescent on all of the other occasions. When it did object, it is glaringly apparent that the primary, and improper, purpose of defendant's counsel was to let the jury know that he had certain evidence which the trial judge would not receive. At no time did defendant request any protective or clarifying instruction. It is obvious that defendant was content to take its chances with the jury, saving its present complaints for the post-trial proceedings.

There is no reason whatsoever to believe that the trial judge was in any way influenced by the remarks of plaintiff's counsel, and yet the trial judge has given his judicial approval to the jury's verdict insofar as the issue of liability is concerned. In requiring the employee to accept a reduction in the amount of the verdict, the trial court may have erred to the disadvantage of the employee, but he has consented to such reduction and he cannot now retract his consent.

The issue of liability was fully presented and fairly decided in this case. Neither the lower state court or the highest state court has found that the defendant was in fact prejudiced by any of the remarks of plain-

tiff's counsel. No contention has been made that the judgment, as reduced, is excessive. The California Supreme Court's determination that the defendant waived any right to an appellate consideration of its claim of misconduct of counsel, by failing to request admonitions which would have been effective in the circumstances of this case, does not diminish or destroy any substantive rights or defenses under the Federal Employers' Liability Act. The defendant, which was represented by experienced counsel, has only itself to blame for its failure to comply with a well established procedural rule. Neither the "integrity of the jury" or the "uniform administration of the federal statute" are affected by a state procedural rule which affords to all parties full opportunity to invoke the corrective action of the trial judge, if the parties should see fit to take advantage of that opportunity. The question raised by defendant in its petition relate entirely to matters of procedure which are governed by the rules of the forum. No federal question warranting review by this court has been presented.

CONCLUSION.

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent.

PROOF OF SERVICE.

I certify that I am a member of the bar of the Supreme Court of the United States and counsel for Mike Sabella, the respondent in the foregoing Brief in Opposition and the party in behalf of whom the service herein stated has been effected; that the person upon whom service was made was the counsel of record for the petitioner, Southern Pacific Company, in the California courts in the action dealt with in the foregoing Brief in Opposition and resides within 500 miles of San Jose, California, where I reside and have my office; that on the 27th day of May, 1969, I served three copies of the foregoing Brief in Opposition upon said counsel for petitioner by enclosing them in a sealed envelope and depositing that envelope in a United States mail box in San Jose, California, with first class postage thereon prepaid and addressed to said counsel at his post office address as follows:

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